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HEADQUARTERS, DEPARTMENT OF THE ARMY
JULY 1962

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PREFACE

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MILITARY LAW REVIEW

CROSS-EXAMINATION OF AN ACCUSED BEFORE COURTS-MARTIAL*

BY CAPTAIN ORRIN R. J. STRIBLEY, JR.**

I. INTRODUCTION

At the point in a court-martial when an accused must elect either to testify on his own behalf or to remain silent, the defense counsel must make what is frequently the most important tactical decision in the defense of the case. The defense counsel knows that, while an accused need not testify on his own behalf and no inference should be drawn from his silence,[1] court members, being human, normally cannot completely ignore the fact that the accused elected to remain silent. After all, who is in better position to contribute to his defense than the accused himself? In a closely contested case, testimony by the accused can often tip the balance in favor of acquittal.

But the defense counsel also knows that an accused cannot tell merely those facts favorable to his defense but "becomes subject to cross-examination upon the issues concerning which he has testified and upon the question of his credibility."[2] Consequently, the defense counsel must initially: (1) determine whether the accused has valuable testimony to contribute; (2) plan the direct examination of the accused so as to anticipate the scope of the cross-examination; and (3) compare the probable value of the testimony for the defense with the probable damage resulting from admissions made on cross-examination. To evaluate the situation properly the defense counsel should understand the rules concerning the scope of cross-examination and the testimonial waiver of the privilege against self-incrimination and should

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* This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Ninth Career Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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[1] 18 U.S.C. § 3481 (1958); U.S. Dep't of Defense, Manual for Courts-Martial, United States, 1951, para. 148*e*, hereafter referred to as the Manual and cited MCM, 1951. First recognition of the accused's competency as a witness on his own behalf was in the Act of March 15, 1878, ch. 37, 20 Stat. 30.

[2] MCM, 1951, para. 149*b*(1).

know the interplay of these rules as they relate to the accused's testimony. Only with this knowledge can the defense counsel proceed intelligently in selecting a course of action.

Just as the defense counsel must balance the possible gain with the possible harm in deciding whether to advise an accused to testify, so must the trial counsel, once the accused has testified, consider the rules concerning the scope of cross-examination and the testimonial waiver of the privilege against self-incrimination. Because testimonial admissions by the accused can fill in gaps in the prosecution proof, the trial counsel cannot afford to use "kid gloves" in his handling of the cross-examination of an accused and so miss valuable opportunities to elict the truth. But he must always consider that, if, on review of the case, a reviewing authority determines that the scope of the waiver of the privilege against self-incrimination has been exceeded, probably it will be held to be general prejudice and a reversal of the conviction will result.[3]

In this article the rules relating to the cross-examination of an accused in a court-martial will be analyzed in order to assist all of the trial participants, particularly the defense and trial counsel, in their handling of this phase of a court-martial. In doing this, the scope of cross-examination will be considered generally, to include a discussion of: (1) the extent of the accused's waiver of the privilege against self-incrimination by testifying; and (2) the permissible scope of cross-examination of an accused. Counsel should never confuse these separate concepts. Distinct legal principles are involved and the waiver of the privilege against self-incrimination is not always coterminous with the permissible scope of cross-examination.[4] For instance, in impeaching an accused through the use of acts of misconduct not resulting in convictions, a question which may be proper because it is within the permissible scope of cross-examination may be outside of the waiver of the privilege against self-incrimination and the accused may be privileged not to answer. This problem will be discussed in detail. However, problems inherent in the waiver of other privileges such as the husband-wife and attorney-client privileges will not be considered. When an accused testifies concerning less than all of the offenses charged, and, if the offenses are either factually interrelated or one offense tends to show intent, knowledge, or motive relevant to the other offense or offenses, these questions must be considered: Does the accused, merely by stating that he will testify

[3] United States v. Williams, 8 USCMA 443, 24 CMR 254 (1957).
[4] 8 Wigmore, Evidence § 2278 (3d ed. 1940).

only concerning certain offenses, effectively limit the scope of cross-examination? How does the joinder of charges affect the scope of cross-examination when an accused elects to testify on less than all offenses charged? What effect does character testimony have when an accused attempts to testify on less than all the offenses charged?

The cross-examination of an accused after he has given "limited purpose" testimony will be discussed.[5] When does his testimony "bear upon the issue of his guilt?" Must or should the same rules on scope of cross-examination after "limited purpose" testimony be followed in an out-of-court hearing as in open court?

Finally, impeachment of an accused will be discussed, with consideration of the problems arising solely through cross-examination, that is, those concerning the form of the questions asked and the impeaching of an accused through the use of acts of misconduct not resulting in conviction.

To provide a framework for the consideration of the cross-examination of an accused in a court-martial, the status of the accused as a witness will be compared with the status of an "ordinary" witness. Federal cases dealing with the principles relating to the waiver of the privilege against self-incrimination and the permissible scope of cross-examination will be discussed in an effort to relate the prevailing federal rules to those applicable to courts-martial.

II. TESTIMONIAL WAIVER OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

In approaching the subject of the cross-examination of an accused either in civilian or military law, one must differentiate at the outset between two separate concepts: (1) the testimonial waiver of the privilege against self-incrimination; and (2) the permissible scope of cross-examination. It is because these two concepts are interdependent that it is easy to overlook the fact that they are distinct. Dean Wigmore states that the end result, whether predicated upon a ruling that a queston exceeds the permissible scope of cross-examination or that there has been no waiver of the privilege against self-incrimination, is often the same because, if there are no questions for an accused to answer,

[5] "If the accused testifies on direct examination only as to matters not bearing upon the issues of his guilt of any offense for which he is being tried, he may not be cross-examined on the issue of his guilt or innocence." MCM, 1951, para. 149*b*(1).

there is necessarily no question of waiver of the privilege against self-incrimination.[6] The distinction between the rules appears most clearly in the impeachment of a witness. While the rule on the permissible scope of cross-examination of a witness may permit, for instance, an inquiry concerning other acts of misconduct not resulting in conviction, the question of the privilege against self-incrimination and its waiver remains undetermined and resort must be had for that purpose to the rule concerning the waiver of the privilege against self-incrimination.[7]

Courts distinguish between the accused and the "ordinary" witness when considering the testimonial waiver of the privilege against self-incrimination. The distinction is predicated upon the fact that, while an "ordinary" witness can be subpoenaed and compelled to testify, the accused cannot be compelled to testify.[8] Thus, it is reasoned that an "ordinary" witness should be able to assert the privilege against self-incrimination at any time prior to the actual incrimination while the accused waives the privilege against self-incrimination by his act of voluntarily testifying.

A. *WAIVER BY "ORDINARY" WITNESS IN FEDERAL COURTS*

The federal courts, in cases concerning the waiver of the privilege against self-incrimination by an "ordinary" witness, have referred to three tests when answering the question of whether there has been a waiver of the privilege against self-incrimination. These tests may be labeled: (1) "incriminating-fact test" under which a broad interpretation of waiver is given, predicated upon the theory that when a witness admits to any incriminating fact there has been a waiver and the witness may be questioned fully and compelled to answer or be punished for contempt of court;[9] (2) "all-elements-of-the-offense test" under which a waiver of the privilege has occurred when the witness has

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[6] 8 Wigmore, Evidence § 2278 (3d ed. 1940).

[7] *Ibid.*

[8] 18 U.S.C. § 3481 (1958).

[9] Rogers v. United States, 340 U.S. 367 (1951). In this case the petitioner, while testifying before a federal grand jury, admitted that she had been treasurer of the Communist party in Denver, Colorado, had possession of the party records, and turned the records over to another person, but she refused to identify the other person, despite being instructed by the court to do so. Her conviction for contempt of court was sustained by the Supreme Court which noted that she had stated incriminating facts and thus had waived her privilege against self-incrimination. However, the petitioner had in fact admitted every element of the offense of conspiring to overthrow the government because the name of the co-conspirator is not an element of the offense.

admitted every element of an offense;[10] and (3) "enough-to-punish test", the narrowest interpretation of waiver which is predicated on the theory that, until a witness admits enough facts to prove his guilt of an offense, there has been no waiver of the privilege against self-incrimination.[11] The federal courts have not distinguished between inquisitory procedures such as the grand jury hearings and adversary proceedings when determining the point at which the "ordinary" witness has waived the privilege against self-incrimination.[12] It would seem that such a distinction might logically be made because, in the investigative proceedings, it is desirable to maintain a narrow interpretation of waiver to encourage a witness to reveal as much information as possible without his fearing that he will totally waive his privilege against self-incrimination. In *Brown v. United States*,[13] the Supreme Court has equated a defendant in a civil case to a defendant in a criminal action rather than equating him to an "ordinary" witness. The narrow interpreation of the waiver of the privilege against self-incrimination by the "ordinary" witness is consonant with the principle that the waiver of a constitutional privilege should not be readily inferred.[14] In *Ballantyne v. United States*,[15] the Court of Appeals for the Fifth Circuit held that a prosecutor could not, by "skillfully" securing from a grand jury witness a general

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[10] United States v. St. Pierre, 132 F.2d 837 (2d Cir. 1942), *petition for cert. dismissed as moot*, 319 U.S. 41 (1943). The defendant admitted before a grand jury that he had embezzled, but refused to state from whom he had embezzled. Since a confession before a grand jury is not a judicial confession, the name of the victim of the embezzlement was needed to establish a corpus delicti. The Court of Appeals, in an opinion by Judge Learned Hand, in affirming a conviction for criminal contempt for the refusal to answer the question, held that once a witness admits the elements of an offense he cannot refuse to supply the details. In dissenting, Judge Jerome Frank said that, because the deefndant hadn't admitted enough facts to enable a prosecutor to establish his guilt of an offense, he hadn't waived the privilege against self-incrimination.

[11] United States v. Courtney, 236 F.2d 921 (2d Cir. 1956). The Court of Appeals here held that there had been no waiver of the privilege against self-incrimination where the defendant at a grand jury hearing admitted paying bribes, but refused to answer further questions concerning the alleged bribes. The *Courtney* case was cited with approval in Isaacs v. United States, 256 F.2d 654 (8th Cir. 1958), in which the Court of Appeals held that there had been no waiver where the defendant had admitted paying bribes but refused to tell the names of the recipients of the bribes where the government was attempting to establish income-tax liability.

[12] United States v. St. Pierre, *supra* note 10.

[13] 356 U.S. 148 (1958). A recent comment on this case discusses the tests which have been used in the federal courts to determine the waiver by an "ordinary" witness. See Comment, *Testimonial Waiver of the Privilege Against Self-Incrimination and Brown v. United States*, 48 Calif. L. Rev. 123 (1960).

[14] Emspak v. United States, 349 U.S. 190 (1955); Smith v. United States, 337 U.S. 137 (1949); Glasser v. United States, 315 U.S. 60 (1942).

[15] 237 F.2d 657 (5th Cir. 1956).

claim of innocence (that he had reported all of his income for tax purposes), preclude the witness from thereafter relying upon his constitutional privilege against self-incrimination when confronted with specific details. Would this reasoning be followed by the Court of Military Appeals in a case where, in a trial, counsel "goaded" an accused, who was testifying for a limited purpose such as the voluntariness of a confession, into making a general denial of the offense? This matter will be discussed in more detail in the section of this article relating to limited purpose testimony.

B. *"ORDINARY" WITNESS IN MILITARY LAW*

> A witness who answers a question without having asserted the privilege and thereby admits a self-incriminating fact may be required to make a full disclosure, however self-incriminating, of the matter to which that fact relates, for to this extent he has waived the privilege by making the answer.[16]

The authors of the Manual specifically considered the decision of *United States v. St. Pierre* in developing this provision.[17] However, the effect of the *Rogers* decision had not been considered at the time of the drafting. The holding in *St. Pierre* was predicated upon an "all-elements-of-the-offense" test, while the holding in *Rogers* was predicated upon the "incriminating-fact" test. However, the "all-elements-of-the-offense" test would appear to be the proper test to be used in determining the point at which there has been a waiver of the privilege against self-incrimination by an "ordinary" witness in military law. It should be kept in mind, however, that while most of the federal cases arise in contempt of court actions resulting from a witness refusing to answer a question in a grand jury hearing, in military law the problem arises at an adversary trial. It appears that a broad interpretation of waiver to the extent that it is within the law officer's discretion is advisable. In *United States v. Ballard*,[18] the Court of Military Appeals was faced with a situation where, in a trial for rape, the law officer sua sponte advised several defense witness of their right to exercise the privilege against self-incrimination shortly after they began to testify. Some of the witnesses availed themselves of the privilege to the prejudice of the accused, who apparently was attempting to show the bad moral character of the prosecutrix as bearing upon the likelihood of whether there was consent to a sexual act. The law officer, on the other hand,

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[16] MCM, 1951, para. 150*b*, p. 284.

[17] Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, p. 237.

[18] 8 USCMA 561, 25 CMR 65 (1958).

deferred instructing a reluctant prosecution witness concerning the privilege against self-incrimination, despite the witness' request for instructions, until after the witness had made statments incriminating the accused. The Court of Military Appeals said:

> But if the law officer favors the witness and keeps evidence out of the record the accused is denied the benefit of testimony which might assist the court-martial in ascertaining the truth. For that reason, a law officer should not interpose repeated warnings unless the witness gives clear indications that he does not understand the advice previously given. It is fairly obvious that implicit in the warning is a suggestion not to answer and to reiterate a prompting once given is to destroy the balance between the protection of the witness on the one hand and the necessity of getting at the truth on the other.[19]

C. *WAIVER OF PRIVILEGE AGAINST SELF-INCRIMINATION BY ACCUSED*

Several tests are applied by the different courts in determining the extent of the waiver by an accused of the privilege against self-incrimination by virtue of his taking the witness stand voluntarily to testify. Dean Wigmore lists the following tests:

> (a) . . . the voluntary taking of the stand is a waiver as to all facts whatever, including even those which merely affect credibility. . . .
>
> (b) . . . the waiver extends to all matters relevant to the issue, meaning thereby to exclude 'collateral' matters, i.e. facts merely affecting credibility. (Dean Wigmore suggests this to be the correct test.)
>
> (c) A third rule, usually originated by statute, makes the accused liable to cross-examination 'like any other witness.' This would upon its face go no further than the second rule . . . i.e. it would not predicate a waiver for facts merely affecting credibility. But it is not always construed so narrowly; and the statute may be supposed merely to be dealing with the topics available for cross-examination . . . without expressing anything as to the doctrine of waiver.
>
> (d) A fourth rule, usually under statute, is that the accused may be cross-examined only as to the subjects already dealt with in his direct examination.
>
> (e) . . . that the waiver extends to no other criminal acts than the one precisely charged.
>
> (f) . . . privilege may be claimed at any time.[20]

1. *Waiver by Accused in Federal Courts*

The rule appears to be reasonably well settled now in federal courts that an accused, by taking the witness stand, waives his privilege against self-incrimination completely. In *Raffel v. United States*,[21] the Supreme Court, in an opinion written by Justice Stone, said:

[19] *Id.* at 566, 25 CMR at 70.
[20] 8 Wigmore, Evidence § 2276 (3d ed. 1940).
[21] 271 U.S. 494 (1926).

> The immunity from giving testimony is one which the defendant may waive by offering himself as a witness. . . . His (an accused's) waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will when cross-examination may be inconvenient or embarrassing.[22]

The Supreme Court concluded that:

> The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness. We can discern nothing in the policy of the law against self-incrimination which would require the extension of immunity to any trial or to any tribunal other than that in which the defendant preserves it by refusing to testify.[23]

In *Raffel* the defendant, charged with Prohibition Act violations, testified in a rehearing to rebut certain testimony of a federal agent, although he did not testify in rebuttal to the same agent's testimony at the original hearing of the case. On cross-examination, the defendant's silence at the original trial was brought out as bearing upon his credibility, and the Supreme Court upheld the admissibility of questions.[24] In *Johnson v. United States*,[25] the Supreme Court pointed out that an accused, by testifying, waives the privilege against self-incrimination as to relevant inquiries into the issues on trial. In the *Johnson* case, the Supreme Court held that the trial court erred in granting a defendant's claim of privilege, but further said that a trial court, having erroneously granted a defendant's claim of privilege, should not allow a prosecutor's comment concerning the claim of privilege.[26] In *Bolling v. United States*,[27] the Court of Appeals for the Fourth Circuit pointed out:

> His (the defendant's) voluntary offer of testimony upon any fact is a waiver as to all other relevant facts because of the necessary connection between all.[28]

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[22] *Id.* at 496–97.

[23] *Id.* at 499.

[24] *But cf.* Grunewald v. United States, 353 U.S. 391 (1957), in which four members of the Supreme Court would expressly overrule the *Raffel* case on the facts of the case.

[25] 318 U.S. 189 (1943).

[26] *Ibid.*

[27] 18 F.2d 863 (4th Cir. 1927).

[28] *Id.* at 865. *Contra*, Tucker v. United States, 5 F.2d 818 (8th Cir. 1925). In the *Tucker* case, the defendant was tried for using the mails to defraud by placing allegedly fraudulent advertisements in newspapers. To convict it was necessary to show that he entered into a scheme to defraud and also that he placed the advertisements in the newspaper. He testifid solely concerning the first element and did not testify on direct examination concerning the insertion of the advertisements in the newspaper. The Court of Appeals held that compelling the defendant on cross-examination to reveal that he

In *United States v. Powers*,[29] the defendant, charged with illegally distilling liquor, testified in a preliminary hearing before a United States commissioner that, although he was arrested near a still, he had no interest in it and was merely hired to "beat" some apples. Over his objection, he was compelled to testify that on a prior occasion not charged "he had worked at a distillery and made some brandy last fall, near his house, and he paid Preston Powers to assist him."[30] The Supreme Court held that the testimony was relevant as bearing upon his innocence, that he had waived his privilege against self-incrimination, and that he could be properly questioned concerning this matter.

Because the accused by testifying waives the privilege against self-incrimination concerning matters relevant to the issues charged, he may properly be compelled to make bodily exhibitions[31] or to furnish a handwriting examplar.[32]

2. *Waiver by Accused in Military Law*

> When the accused voluntarily testifies about an offense for which he is being tried, as when he voluntarily testifies in denial or explanation of such an offense, he thereby, with respect to cross-examination concerning that offense, waives the privilege against self-incrimination, and any matter relevant to the issue of his guilt or innocence of such offense is properly the subject of cross-examination.[33]

It seems likely that the statement that the accused "with respect to cross-examination concerning that offense, waives the privilege against self-incrimination" in the Manual adopts the test of waiver which Dean Wigmore sets out as the correct test of waiver, that is, that the waiver does not extend to those matters merely affecting credibility.[34] Herein the testimonial waiver of the privilege against self-incrimination as it applies to matters con-

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placed the advertisements in the newspaper was a violation of the privilege against self-incrimination because the waiver of the privilege by testifying applies only to the subjects testified to on direct examination. Since the defendant has testified on direct examination only as to one element of the offense, he could be cross-examined only concerning that element and the waiver extended only to one element of the offense.

[29] 223 U.S. 303 (1912).

[30] *Id.* at 311.

[31] Neely v. United States, 2 F.2d 849 (4th Cir. 1924), in which the defendant, who testified that he had never been shot, was asked on cross-examination to show his arm. The defense objection to compelling the demonstrating of the arm was overruled by the court. It is not clear in the record, however, whether in fact that the arm was ever exhibited.

[32] United States v. Mullaney, 32 Fed. 370 (E.D. Mo. 1887). The defendant was charged with tampering with an election by writing certain names in an election book. Upon his denial that he wrote the names, it was held proper to have him write the names in the presence of the jury for purposes of handwriting comparison.

[33] MCM, 1951, para. 149*b*(1).

[34] 8 Wigmore, Evidence § 2276 (2)(b)(3d ed. 1940).

cerning the issue of guilt or innocence will be discussed. The testimonial waiver as it relates to matters solely affecting credibility will be considered in a subsequent section dealing with impeachment of an accused. In a significant military case concerning the waiver of the privilege against self-incrimination by an accused who testifies, the Court of Military Appeals, in *United States v. Kelly*,[35] quotes the language of the Manual and also quotes with approval Dean Wigmore's expression of the extent of the waiver. In the *Kelly* case, the accused, charged with larceny of an automobile, with a three-day absence without leave, and with escape from lawful custody, elected to testify regarding the larceny and the absence without leave charges but not regarding the escape from custody charge. The accused had been apprehended when he drove the car, which had no military tags and which belonged to a Louisville, Kentucky, resident, onto the post at Fort Knox, Kentucky. He was taken to the military police station where the desk sergeant made a telephone call to obtain information concerning the car. Apparently the accused overheard the sergeant refer to the car as "stolen" because, at this time, the accused ran out of the station. He stayed absent without leave for three days before surrendering to military authorities. On his direct examination, the accused testified that he to k the car to insure that he would get back to the post on time because his first sergeant had stressed the seriousness of being absent without leave. The defense counsel then asked him: "Now, on August 9, around 2200 or around 11 o'clock . . . ten o'clock, did you go back to Louisville? The day after?" [36] The accused then testified that he had returned to Louisville and explained that, during his three-day absence, he attempted to find the owner of the car. On cross-examination, despite his claim of the privilege against self-incrimination, he was questioned concerning his escape from custody. The trial counsel asked him: "Didn't you state that you heard the desk sergeant repeat the words 'stolen vehicle'?" The accused answered: "After that I knew I was in trouble."[37] The Court of Military Appeals, in holding that there had been no violation of the privilege against self-incrimination, said that the questions concerning the escape from custody were relevant to the question of intent to steal the automobile and "trial counsel by his cross-examination was apparently attempting to point out that the reason the accused left the police station as he did was not because he wanted to find the owner of the car, but rather for the reason that he did not want to be charged with

[35] 7 USCMA 218, 22 CMR 8 (1956).
[36] *Id.* at 219–20, 22 CMR at 9–10.
[37] *Id.* at 220, 22 CMR at 10.

larceny."[38] Consequently, there had been a waiver to the matter concerning the escape because it was relevant to the issue of guilt or innocence of the offense of which he did testify.[39]

Another extremely helpful case in understanding the testimonial waiver by the accused of the privilege against self-incrimination is *Bryant*.[40] In the *Bryant* case, the accused was tried for burglary with intent to commit rape. He took the stand, was asked no questions on direct examination, the defense counsel merely indicating that the accused would answer questions put to him by the court. The trial counsel cross-examined the accused, then there was examination by the court and finally the defense counsel for the first time questioned the accused on direct examination. In holding that there was no violation of the privilege against self-incrimination, the board of review said:

> In the interest of clarity we point out that the crux of our discussion is not what is a proper scope of cross-examination of an accused after direct examination, but rather what constitutes a waiver by an accused of the right against testimonial self-incrimination without regard to the distinct question of what is a proper scope of examination after a waiver is deemed to exist. . . . In the instant case the waiver was consummated when the accused, being fully aware of his rights, voluntarily elected to take the stand and offered himself for examination on clearly expressed limits of examination. Thus we construe under the circumstances of the instant case his voluntary and intelligent election to take the stand and offering himself for examination on the merits of the offenses to be equivalent to having testified on direct examination upon the general issues of his innocence or guilt. Any other view would be an unjustified adherence to form over substance.[41]

A study of the military cases concerning the testimonial waiver of the privilege against self-incrimination indicates that judicial interpretation of the Manual provision on the scope of the waiver has given it a broad rather than a restrictive application. The testimonial waiver of the privilege against self-incrimination of the accused has been held to apply to all matters relevant to the issues of guilt or innocence of the offense or offenses about which the accused has testified. This interpretation is appropriate because the accused, having a choice of testifying or remaining silent, should not be allowed to testify and, at the same time, still be able to assert the privilege against self-incrimination whenever questioning becomes embarrassing to him.

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[38] *Id.* at 223, 22 CMR at 13.

[39] It is noted that in this case the accused was convicted of wrongful appropriation of the car, not larceny as charged.

[40] ACM 8303, Bryant, 15 CMR 601 (1954), *pet. denied*, 4 USCMA 731, 15 CMR 431 (1954).

[41] *Id.* at 608.

III. PERMISSIBLE SCOPE OF CROSS-EXAMINATION

Having discussed the testimonial waiver of the privilege against self-incrimination by an "ordinary" witness and by an accused in both the federal courts and in courts-martial, consideration will now be given to the permissible scope of cross-examination of the "ordinary" witness and the accused in the federal courts and in courts-martial. As mentioned previously, the concepts of the waiver of the privilege against self-incrimination and the permissible scope of cross-examination must be distinguished at all times for a clear understanding of the problems which arise in the cross-examination of an accused. In the following discussion, then, consideration is limited to the range of questions which may be permissibly asked without consideration of whether the witness may be privileged not to answer a particular question.

A. *SCOPE OF CROSS-EXAMINATION OF "ORDINARY" WITNESS IN FEDERAL COURTS*

A cross-examiner has one or more of four objects in mind when he sets out to cross-examine any witness, including an accused. He will attempt: (1) to have the witness retract or contradict the testimony which the witness gave on direct examination; (2) to uncover and emphasize unfavorable elements in the direct examiner's case which were not disclosed during the direct examination; (3) to develop favorable elements in the cross-examiner's case, such as affirmative defenses; and (4) to impeach the witness. Depending on the jurisdiction involved, the cross-examiner may permissibly do two, three, or even all of these things. For purposes of general classification or labeling of the general theories of the scope of cross-examination, authors speak of: (1) the English rule; (2) the Michigan rule; and (3) the federal rule concerning scope of cross-examination.[42]

The so-called "English rule" concerning the scope of cross-examination, originally followed in this country in all courts, and still followed in certain jurisdictions, notably Massachusetts, uses the test of relevancy to any issue of the case in determining the area of permissible cross-examination. Thus, under this rule, the cross-examiner may even establish affirmative defenses during the cross-examination of a witness.[43]

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[42] Note, 24 Iowa L. Rev. 564 (1939), discusses the three principal theories concerning the permissible scope of cross-examination.

[43] The proponents of this rule stress that this is the fairest rule of cross-examination in that each witness is required to explain all relevant facts of the case which he knows. Thus, one party of the litigation is not permitted

Under the so-called "Michigan rule," a coss-examiner may ask questions on any issues of the case, whether or not covered in the direct examination, so long as the matters examined upon deal with the direct examiner's case and not strictly with the cross-examiner's case.

The so-called "federal rule" of cross-examination was first enunciated in the cases of *Ellmaker v. Buckley*[44] and *Philadelphia & Trenton Ry. Co. v. Stimpson.*[45] In the latter case, Justice Story stated that a cross-examiner is limited to the matters testified to or germane to the subject of the direct examination. This concept generally is still followed in the federal courts and in about two-thirds of the states.[46]

Under the "federal rule" concerning cross-examination, the trial judge has discretion in determining the extent of cross-examination,[47] and abuse of the discretion is found where the cross-examination has been curbed to the prejudice of one of the parties to the action rather than where there has been a broad extension of the cross-examination.[48] In *Alford v. United States,*[49] the defense, in a prosecution for using the mails to defraud, sought to impeach a prosecution witness by asking him where he resided in an effort to show that the witness was in the custody of federal authorities. The Supreme Court held that the trial court had abused its discretion in refusing to permit the questions to be asked and answered.[50] This result, in the case of impeachment, would be permitted under any of the tests concerning scope of cross-examination.

B. *SCOPE OF CROSS-EXAMINATION OF AN ACCUSED IN FEDERAL COURTS*

There has been a conflict in the federal courts concerning the correct interpretation of the "federal rule" concerning the scope of cross-examination as it relates to the testimony of an accused. In many cases, particularly in the older cases, the accused was

to paint a distorted picture of the facts by presenting at one time all the favorable facts and withholding all the unfavorable facts of his case. Opponents of the English rule point out that this rule prevents an orderly presentation of the case by the direct examiner.

[44] 16 S. & R. 72, 77 (Pa. 1827).

[45] 39 U.S. (14 Pet.) 448 (1840).

[46] McCormick, Evidence § 21 (1954); 8 Wigmore, Evidence § 1885 (3d ed. 1940).

[47] Glasser v. United States, 315 U.S. 60 (1942).

[48] District of Columbia v. Clawans, 300 U.S. 617 (1937); Alford v. United States, 282 U.S. 687 (1931).

[49] 282 U.S. 687 (1931).

[50] *Ibid.*

equated to an "ordinary" witness and decisions indicated that the accused's cross-examination was limited to the matters covered in the direct examination.[51] The Supreme Court has often taken a more liberal view of the permissible scope of cross-examination of an accused in permitting all relevant inquiries about the charge against the defendant.[52]

An extremely narrow view of the permissible scope of cross-examination of a defendant was expressed in *Tucker v. United States*,[53] in which the defendant, charged with using the mails to defraud, testified only as to one of the two elements involved in the offense charged and was cross-examined concerning both elements. The Court of Appeals in holding that the cross-examination exceeded the scope of the direct examination said:

> If there is a good reason why a defendant should not be compelled to be a witness against himself, there ought to be equally good reason why, if he has testified voluntarily upon one issue, he should not be compelled to testify against his will concerning matters wholly unrelated to that issue, which would not be within the scope of proper cross-examination if he were an ordinary witness.[54]

Similarly, in *Salerno v. United States*,[55] the court in holding that the subject matter inquired about on direct examination determines the scope of the cross-examination stated.

> A defendant may take the stand, and, by omitting to testify as to incriminating matters unrelated to those matters about which he has testified, prevent the prosecution from cross-examining him fully, subjecting himself, however, to the unfavorable inferences which may be drawn from his failure to make a full disclosure.[56].

In *Fitzpatrick v. United States*,[57] the Supreme Court, however, upheld the action of the trial court in allowing cross-examination to extend beyond the precise bounds of the testimony in chief. The defendant, charged with a murder committed in Alaska, was tried under Oregon laws which were assimilated as the territorial law of Alaska. Fitzpatrick, who was tried jointly with one Brooks and one Corbett, on direct examination answered only one question setting up an alibi by saying that he was at another place when the murder occurred. On cross-examination the government was permitted to ask the defendant questions about his attire on the night of the shooting, of his acquaintance with Corbett, whether Corbett had shoes of a kind similar to blood-stained shoes found in

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[51] Sawyer v. United States, 202 U.S. 150 (1906); Tucker v. United States, 5 F.2d 818 (8th Cir. 1925).
[52] Johnson v. United States, 318 U.S. 189 (1943).
[53] 5 F.2d 818 (8th Cir. 1925).
[54] *Id.* at 822.
[55] 61 F.2d 419 (8th Cir. 1932).
[56] *Id.* at 423–24.
[57] 178 U.S. 304 (1900).

the defendant's cabin, whether the defendant saw Corbett on the night preceding the shooting, whether Corbett roomed with the defendant in the defendant's cabin and whether the defendant saw any one else in the cabin in addition to Brooks and Corbett. The Supreme Court pointed out that: ". . . the prosecution has a right to cross-examine (the defendant) upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime."[58]

An important case in which the Supreme Court indicated that a defendant by testifying volunteers to answer all relevant inquires about the charge against him is *Johnson v. United States.*[59] The defendant was tried for income tax evasion. He testified on direct examination that he received $50,400 from the "numbers" syndicate in 1937, all prior to November 1937. He admitted that he only reported $30,189.99 on his income tax return but claimed that he had an honest but mistaken belief that $21,000 in political contributions was deductible from his taxable income. The indictment charged that he had received $62,400 from the "numbers" syndicate in 1937 including $1,200 a week each week in November and December 1937. On cross-examination he was asked if he received any money from the "numbers" syndicate in 1938.[60] The Supreme Court, Justice Douglas writing the majority opinion, held that the inquiry into the 1938 income was relevant to the issues of the case in that the jury might conclude that payments in 1938 indicated that there was no interruption of payments in November and December 1937, showing the continuous nature of the transaction, and negating the defense claim that there had been an honest mistake of fact concerning the amount of reportable income.[61] In the case of *Bell v. United States,*[62] the defendant in a murder trial stated that he "blacked out" at the time of the murder and that his state of mind was caused by the destruction of the sanctity of his home by the victim. On cross-examination he was questioned concerning an alleged illicit love affair and this

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[58] *Id.* at 315.

[59] 318 U.S. 189 (1943).

[60] This line of questioning was objected to because the defendant was under investigation for income tax evasion predicated upon 1938 income.

[61] It should be noted that the question concerning the permissibility of the cross-examination questions is *dicta* because the trial court erred by sustaining the claim of waiver by the defendant, and then erred again by permitting the prosecutor to comment upon the defendant's claim of waiver. The Supreme Court held that there was an express waiver by the defense of the error and affirmed the decision.

[62] 210 F.2d 711 (D.C. Cir. 1953), *cert. denied,* 347 U.S. 956 (1954); 353 U.S. 924 (1957); 356 U.S. 963 (1958); 362 U.S. 924 (1960).

questioning was held to be relevant and permissible within the scope of cross-examination.[63]

A trial judge should allow a greater latitude in the extent of cross-examination of an accused than in the cross-examination of an "ordinary" witness.[64] This rule is predicated upon the fact that to permit a defendant to limit his examination to a narrow point permits him to distort facts and leave the prosecution without an opportunity to correct this distortion because the prosecution cannot call the defendant as a witness. So, while earlier cases tended to equate an accused with an "ordinary" witness for purposes of determining the scope of cross-examination, more recent cases, particularly the *Johnson* case, indicate a present tendency on the part of the courts to use the test of "relevancy to the issues involved" in determining the permissible scope of cross-examination of an accused. Furthermore, greater latitude should be given to the cross-examination of an accused than an "ordinary" witness. The broad test allowing cross-examination on all matters relevant to the issues charged appears more consonant with justice than to limit the cross-examination narrowly to the matters brought up on direct examination and thus permit the defendant to distort the facts.[65]

C. *"ORDINARY" WITNESS IN MILITARY LAW*

The Manual rule concerning the scope of cross-examination says in pertinent part:

> Cross-examination of a witness is a matter of right. It should in general, be limited to the issues concerning which the witness has testified on direct examination and to the question of his credibility.[66]

The Court of Military Appeals cited with approval the Manual provision in the case of *United States v. Heims*.[67] In the *Heims* case, the accused was charged with willful disobedience of a sergeant's order and the sergeant who issued the order testified on direct examination that he gave the order and that the accused refused to obey it. On cross-examination the defense counsel

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[63] *Accord*, Carpenter v. United States, 264 F.2d 565 (4th Cir. 1959), *cert. denied*, 360 U.S. 936 (1959); United States v. Gates, 176 F.2d 78 (2d Cir. 1949).

[64] Garber v. United States, 145 F.2d 966 (6th Cir. 1944); Twachtman v. Connelly, 106 F.2d 501 (6th Cir. 1939).

[65] Professor McCormick criticizes the application to a criminal defendant of the rule limiting cross-examination to subjects covered on direct examination because such an application converts a rule, designed to relate to the order of proof, into one enabling the accused to limit his examination to one single phase of the case. McCormick, Evidence § 26, at p. 49 (1954).

[66] MCM, 1951, para. 149*b*(1).

[67] 3 USCMA 418, 12 CMR 174 (1953).

attempted to elicit testimony concerning the reasons that the accused gave the sergeant for his failure to obey.

The law officer ruled that this line of questioning exceeded the scope of the direct examination and informed the defense counsel that he could, if he desired, call the sergeant as a defense witness, which the defense counsel did. The Court of Military Appeals held that the ruling of the law officer was not erroneous. In *United States v. Harvey,* [68] the accused was tried for assault by shooting. A policeman, called as a prosecution witness, testified on direct examination concerning an oral statement made by the accused. He was asked on direct examination if a written statement had been made and he answered that it had been but "not at that time." On cross-examination, the defense counsel asked about the contents of the written statement, but the law officer sustained an objection by the trial counsel that the cross-examination exceeded the scope of the direct examination. The Court of Military Appeals held that the law officer unduly restricted the cross-examination of the officer concerning a matter which had been brought to light on direct examination, but held that the error was not prejudicial because the defense counsel subsequently called the policeman as a defense witness.

The Manual points out, concerning the extent of cross-examination, that: "The extent of cross-examination with respect to a legitimate subject of inquiry is within the sound discretion of the court." [69] This provision codifies for military law the federal case law to the effect that the judge has discretion to determine the extent of the cross-examination of a witness.[70] The Court of Military Appeals has pointed out on several occasions[71] that the law officer has discretion over the extent of cross-examination and an error in the application of the discretion occurs when the law officer unduly restricts the cross-examination rather than in allowing too broad a cross-examination.[72]

D. *ACCUSED IN MILITARY LAW*

For an understanding of the position of the accused with reference to the permissible scope of cross-examination, a close study

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[68] 8 USCMA 538, 25 CMR 42 (1957).

[69] MCM, 1951, para. 149*b*(1).

[70] Alford v. United States, 282 U.S. 687 (1931).

[71] United States v. Harvey, 8 USCMA 538, 25 CMR 42 (1957); United States v. Hernandez, 4 USCMA 465, 16 CMR 39 (1955); United States v. Heims, 3 USCMA 418, 12 CMR 174 (1953).

[72] United States v. Harvey, *supra* note 71; United States v. Hernandez, *supra* note 71.

of a subparagraph of paragraph 149*b*(1), MCM, 1951, is imperative.[73] The applicable provision states:

> An accused person who voluntarily testifies as a witness becomes subject to cross-examination upon the issues concerning which he has testified and upon the question of his credibility. So far as the latitude of the cross-examination is discretionary with the court, a greater latitude may be allowed in his cross-examination than in that of other witnesses. When the accused voluntarily testifies about an offense for which he is being tried, as when he voluntarily testifies in denial or explanation of such an offense, he thereby, with respect to cross-examination concerning that offense, waives the privilege against self-incrimination, and any matter relevant to the issue of his guilt or innocence of such offense is properly the subject of cross-examination. When an accused is on trial for a number of offenses and on direct examination has testified about only one or some of them, he may not be cross-examined with respect to the offense or offenses about which he has not testified. If the accused testifies on direct examination only as to matters not bearing upon the issue of his guilt or innocence of any offense for which he is being tried, he may not be cross-examined on the issue of his guilt or innocence. Thus, if an accused testifies on direct examination only as to the involuntary nature of his confession or admission, he may not be asked on cross-examination to state whether his confession or admission was true or false, for such a question would go to the issue of his guilt or innocence, concerning which he has not testified.[74]

An examination of this provision of the Manual reveals that it is really divided into four parts. In part one a general statement is made concerning the scope of cross-examination of an accused. Then, in the following three parts of the subparagraph specific attention is given to three specific situations in which the accused testifies, to wit:

(1) When the accused testifies voluntarily in denial or explanation of an offense, he waives the privilege against self-incrimination and "any matter *relevant to the issue of his guilt or innocence of such offense* is properly the subject of cross-examination" (emphasis added).

(2) When an accused testifies as to less than all of the offenses charged, he may be cross-examined solely about the offenses concerning which he did testify.

(3) When an accused testifies concerning a matter not bearing upon the issue of his guilt or innocence, he may not be cross-examined concerning his guilt or innocence.

In this section the provision relating to the permissible cross-examination of an accused after he has testified upon guilt or innocence generally will be discussed. In subsequent sections the

[73] MCM, 1951, para. 149*b*(1), at p. 280.
[74] *Ibid.*

situation of testimony on less than all offenses charged and of testimony only with reference to an interlocutory matter will be considered.

The Manual provides that an accused may be cross-examined upon any matter "relevant to the issue of his guilt or innocence of such offense" and sets out a broad area of cross-examination for the accused. Judicial interpretations of the Manual provision to date have tended to recognize and given effect to this broad application. In *United States v. Kelly*,[75] the accused, charged with larceny of an automobile, a three-day absence without leave and escape from custody, attempted to testify concerning the larceny of the automobile and the absence without leave without testifying concerning the escape from custody. On cross-examination, over defense objection, the law officer permitted the trial counsel to show that the accused escaped from custody after being apprehended for questioning on the larceny charge. The Court of Military Appeals, in holding that the cross-examination was proper because it tended to refute his defense to the larceny charge, said:

> . . .[T]he cross-examination of an accused which requires him to limit, explain or modify his direct testimony is proper. . . . Counsel for the accused undoubtedly realized that, when his client took the stand, he could not help trespassing in this area. However, this is risk which the accused knowingly incurred when he took the stand. For us to hold the prosecution could not probe into this area of the accused's behavior would mean a practical abolition of the Government's right of cross-examination with respect to the larceny charged.[76]

So the cross-examination relevant to the issue of the guilt or innocence of larceny was permissible even though it incidentally revealed another offense for which the accused was on trial.

In considering the test of relevancy, the *Worthen* case[77] is particularly interesting. In that case, in stating the accused's election to testify, the defense counsel announced that the accused, charged with desertion, would testify "not as to the merits of the case, but as to his military record."[78] But the defense counsel actually pointed out the contradictory nature of this statement when he also said:

> Now the evidence that the defense will offer is of a peculiar nature. It's quite acceptable. *And it is through this evidence that we will rebut any evidence whatever which the prosecution may have introduced as to an intent to desert.*[79]

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[75] 7 USCMA 218, 22 CMR 8 (1956). See text acompanying note 35 *supra* for a complete statement of the facts in this case.

[76] *Id.* at 220, 22 CMR at 10.

[77] NCM 5502427, Worthen, 19 CMR 556 (1955).

[78] *Id.* at 557.

[79] *Ibid* (emphasis in original report).

The law officer instructed the accused that, if he testified as to the character of his military service, he would be subject to cross-examination on the merits of the offense of desertion. In view of this ruling by the law officer, the accused elected not to testify.[80] The board of review in upholding the ruling of the law officer said that:

> Once the accused testified to his military record such testimony would tend to rebut the issue of intent and would be relevant to his guilt or innocence of the offense of desertion.[81]

In this case, the character evidence, testimony of prior good military service, would bear upon the issue of the accused's intent to desert. This fact was emphasized by the defense counsel in his remark which was preliminary to offering the accused as a witness. Clearly, the proposed character testimony would tend to disprove the element of the intent to desert and would be testimony about an offense for which the accused was being tried. Any matter "relevant to the issue of his guilt or innocence of such offense" was within the area of permissible cross-examination.

E. *CONCLUSIONS*

The Manual provides for a broader scope of cross-examination for an accused than it does for an "ordinary" witness when it states:

> When the accused voluntarily testifies about an offense for which he is being tried, as when he voluntarily testifies in denial or explanation of such an offense, . . . any matter relevant to the issue of his guilt or innocence of such offense is properly the subject of cross-examination.[82]

Judicial construction of this Manual provision indicates an intent to give full effect to the broad permissible scope of cross-examination envisioned by the Manual's words rather than restricting the thrust of the Manual provision. This interpretation seems to be consonant with many cases in the federal courts and is also consonant with the idea that it is not fair to the government to allow an accused to testify to a narrowly limited issue and then present a distorted picture of the true facts of the issue by being permitted to limit his cross-examination to that narrow issue.

IV. ACCUSED TESTIFYING ON LESS THAN ALL OFFENSES

> When an accused is on trial for a number of offenses and on direct examination has testified about only one or some of them, he may not

[80] Because the substance of the anticipated testimony from the accused was placed in evidence through the use of service record extracts, conceding error in the ruling of the law officer, such error would probably not have been held to be prejudicial.

[81] 19 CMR at 558.

[82] MCM, 1951, para. 149*b*(1).

be cross-examined with respect to the offense or offenses about which he has not testified.[83]

This provision of the Manual apparently merely makes explicit what is implicit from the rule concerning the permissible scope of cross-examination of an accused, that is, once he testifies about an offense for which he is being tried he may be cross-examined upon "any matter relevant to the issue of his guilt or innocence *of such offense*" (emphasis added). Although an accused who desires to testify on less than all of the offenses usually announces this fact to the court, his proclamation of his intent seems to be no more than a red flag being waved to signal to the law officer and the trial counsel what the accused will "attempt" to do. His stated intent does not control the scope of cross-examination for, in the words of the Manual, the scope of cross-examination is limited if "on direct examination (he) has *testified* about only one or some" of the offenses charged.[84] This fact is pointed up in the case of *United States v. Kelly*.[85] As previously mentioned, in the *Kelly* case, the accused was charged with larceny of an automobile, with a three-day absence without leave and with escape from custody. While testifying only with regard to the larceny and AWOL offenses, he stated that he had spent the three days while absent without leave in Louisville, Kentucky, attempting to return the automobile to its owner. The defense counsel attempted to skirt the fact that it was from a military police station at Ft. Knox that the accused left to go to Louisville by this cautious question: "Now, on August 9, around 2200 or around 11 o'clock . . . ten o'clock, did you go back to Louisville? The day after?" The accused answered, "Yes, I did."[86] Trial counsel then brought out the fact that the accused in fact ran from the military police station after he heard a desk sergeant mention the word "stolen" and then went to Louisville. In holding the cross-examination to be proper, the Court of Military Appeals pointed out that the circumstances under which the accused returned to Louisville were relevant to the issues of guilt or innocence of the offense to which he had testified and consequently the accused simply hadn't succeeded in limiting his testimony.

In the *Kelly*-type situation where multiple charges are so interrelated that an explanation of the circumstances of one offense of necessity compels intrusion into the area of another offense, some cross-examination is permissible concerning the latter offense. However, the *Kelly* case does not appear to be authority for a

[83] *Ibid.*
[84] *Ibid* (emphasis added).
[85] 7 USCMA 218, 22 CMR 8 (1956).
[86] *Id.* at 219–20, 22 CMR at 9–10.

searching and detailed examination into elements which are not factually interrelated with the offense upon which the accused does testify. In the *Kelly* case, for example, the trial counsel only attempted to show that it was the military police station from which the accused left to return to Louisville and this was clearly relevant concerning his intent when he returned to Louisville. Trial counsel did not attempt to question the accused about other elements of the escape from custody which did not bear upon the question of intent as it related to the larceny charge.

Character testimony can be of such a nature as to constitute testimony on all the offenses charged and permit of cross-examination upon all the charges. In *Worthen*,[87] the accused was charged with absence without leave, with desertion and with failing to obey a lawful order. When the defense counsel advised that the accused was going to testify "not as to the merits of the case, but as to his military record," the law officer advised the defense counsel that the accused would then be subject to cross-examination on any or all offenses.[88] The board of review held this ruling to be proper. Such general character evidence would be "relevant to the issues of guilt or innocence" of all the offenses. However, character testimony, too, would not always be relevant to all offenses charged. A specific character trait introduced to rebut the likelihood that an accused committed a particular offense would not be "relevant to the issues of guilt or innocence" as to other offenses charged. For example, an accused, charged with assault and with desertion, by testifying as to his peaceableness would not be testifying with respect to the desertion charge because such evidence would not tend to show his innocence of the desertion charge.

A. *MERELY "TOUCHING" UPON A CHARGE*

The Court of Military Appeals in the case of *United States v. Johnson*[89] has taken the view that "an incidental and natural reference" to an offense is not sufficient testimony to permit cross-examination concerning the offense referred to.[90] In the *Johnson* case, the accused was charged with absence without leave from 5 May 1958 to 3 June 1958; desertion from 18 June 1958 terminated by apprehension on 20 July 1958; violation of a straggler order issued on 23 July 1958 directing him to return to his unit and report to his commanding officer; and desertion

[87] NCM 5502427, Worthen, 19 CMR 556 (1955).
[88] *Id.* at 557.
[89] 11 USCMA 113, 28 CMR 337 (1960).
[90] *Id.* at 115, 28 CMR at 339.

from 27 July 1958 terminated by apprehension on 30 January 1959. The accused elected to testify solely concerning the violation of the straggler order. He ended his testimony relating to the straggler order by saying that he went "over the hill again the next morning." The trial counsel, without objection by the defense, proceeded to interrogate the accused in detail with respect to the desertion alleged to have begun on 27 July 1958, after the alleged violation of the straggler order, and on re-direct, the defense counsel for the first time interrogated the accused concerning this offense. Judge Ferguson wrote the majority opinion, in which Chief Judge Quinn concurred, and said that the accused's reference to the last period of absence without leave was only an "incidental and natural reference to his second absence in connection with the offense concerning which he had elected to testify" and the subsequent cross-examination was improper.[91] Furthermore, the prejudice was not removed by the re-direct examination by the defense. Judge Latimer, dissenting, said that the door to the cross-examination was opened by the accused, but, in any event, there was a waiver even assuming that there was error.

On first impression the decisions in the *Kelly* and *Johnson* cases seem inconsistent. However, they can be reconciled. First, in the *Kelly* case, the accused, by omitting in his direct testimony the fact that he was in the military police station and heard the desk sergeant mention the word "stolen" with reference to the car, strengthened his claim that his reason for returning to Louisville was solely to return the car. This omitted evidence was clearly relevant to the question of his guilt or innocence of the larceny. In the *Johnson* case, the accused's statement that he went "over the hill again the next morning" does not tend to show his guilt or innocence of failing to obey the straggler order. Second, in the *Kelly* case, the trial counsel only cross-examined the accused concerning the escape from custody charge to the extent of the factual relevancy overlap of the two charges. In the *Johnson* case, the trial counsel went into detailed cross-examination of the desertion charge beyond any relationship of that charge to the failing to obey offense. Third, in the *Johnson* case, it is doubtful that the accused's reference that he went "over the hill" tended to rebut any element in the offense of desertion so as to be testifying concerning his guilt or innocence of this offense.[92]

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[91] *Ibid.*

[92] Because the accused, in testifying on the straggler order, stated that, when he arrived at his post, he found that the forward elements of his regiment had departed and he was shuttled between several different units, all of which disclaimed responsibility for him, it is also arguable that, by saying he went "over the hill," he was indicating an intent to leave to try to seek out his own unit rather than leaving with an intent to desert.

The most difficult problems concerning the scope of cross-examination arise when an accused elects to testify on less than all offenses charged and the offenses charged are factually interrelated. In deciding the proper scope of cross-examination in these situations, two conflicting interests must be balanced to determine the proper scope of cross-examination. First, the government's interest in justice demands that an accused not be permitted to testify as to facts tending to show his innocence of an offense without giving the trial counsel an opportunity to establish all the circumstances through cross-examination. On the other hand, the accused's interest in being permitted to testify on less than all offenses charged must be upheld. So, testimony not tending to prove his innocence of a particular offense should not be permitted to be used as a lever to extract detailed testimony from him concerning offenses about which he did not intend to testify. Thus, it appears that the issue to be determined is the extent to which an accused may be forced to submit to cross-examination in order to prevent him from presenting a one-sided story to the court concerning any offense. In fairness to the accused, a mere reference to a separate charge ought not "open the door" to a searching cross-examination by the trial counsel concerning that charge. But, in the interest of justice, if the accused makes a statement which, if believed by the court, would tend to establish the accused's innocence of the charge, the trial counsel should be given the opportunity for a full cross-examination upon all matters relevant to the issues of guilt or innocence.

B. *JOINDER OF CHARGES AS AFFECTING SCOPE OF CROSS-EXAMINATION*

In courts-martial, the principles involving joinder of charges are different from those applicable in the federal district courts. In the military, normally all known charges are joined, subject to the limitation barring the joining of serious and minor offenses,[93] while in the federal district courts, the joinder of offenses is restricted much more.[94] A brief discussion of the joinder of

[93] MCM, 1951, para. 26*b* and *c;* Legal and Legislative Basis, MCM, 1951, pp. 40–41.

[94] Rule 8(a), Federal Rules of Criminal Procedure, states: "Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more sets of transactions connected together or constituting parts of a common scheme or plan."

offenses in federal courts may be helpful as introductory material for a discussion of the recently decided military case of *United States v. Marymont.*[95]

1. *Joinder in Federal Courts*

The purpose of the joinder provision in federal courts is set out in *Catanee v. United States,*[96] in which case the court said that in deciding if a joinder is permissible there must be a balancing of the conflicting interest of speed, efficiency and convenience in the function of federal judicial machinery against the right of the accused to a fair trial without any substantial prejudice occasioned by joinder of offenses. There can be no joinder of distinct felonies not provable by the same evidence and in no sense resulting from the same series of acts.[97] Offenses should not be joined so as to embarrass an individual's defense.[98] Even though there has been an improper joinder of offenses and one count in an indictment is subsequently dismissed, this fact will not operate to withdraw from the jury evidence introduced under the dismissed count if such evidence is admissible to show criminal intent under the count not dismissed.[99] In the case of *Bryan v. United States,*[100] the defendant was charged in separate counts with passing counterfeit nickels and of possessing molds for counterfeiting quarters. Although the count alleging the possessing of molds for counterfeiting quarters was dismissed by the trial judge, evidence submitted under this charge was permitted to be considered by the jury as bearing upon the criminal intent in the charge of passing the counterfeit nickels.

2. *Scope of Cross-Examination as Bearing Upon Joinder*

A joinder in military law of certain offenses may prevent inquiry on cross-examination of an accused, who is testifying upon less than all offenses charged, into matters which are relevant and which would be the subject of proper cross-examination had the charges not been joined. In *United States v. Marymont*[101] the accused was charged with and convicted of premeditated murder and adultery, and sentenced to a dishonorable discharge and confinement at hard labor for life. At his trial, the accused testified only concerning the murder charge and on examination in chief

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[95] 11 USCMA 745, 29 CMR 561 (1960).
[96] 167 F.2d 820 (4th Cir. 1948).
[97] McElroy v. United States, 164 U.S. 76 (1896).
[98] Dolan v. United States, 133 Fed. 440, 446 (8th Cir. 1904).
[99] Bryan v. United States, 133 Fed. 495 (5th Cir. 1904).
[100] *Ibid.*
[101] 11 USCMA 745, 29 CMR 561 (1960).

he testified as to: (1) whether he had attempted to purchase arsenic; (2) whether he had administered arsenic to his wife; (3) whether he had applied for an extension of his overseas tour on the day after his wife's death; and (4) his reasons for the requested extension of his overseas tour. Over defense objection, on cross-examination the details of the alleged adultery were established. On review by the Court of Military Appeals, the government argued that the questions concerning the adultery were relevant to show a motive for murder and were within the scope of permissible cross-examination of the accused. All three judges of the Court conceded that the questions were relevant as showing a motive for the murder, but the majority (Chief Judge Quinn and Judge Ferguson) held that the joinder of the offenses prevented an excursion into matters otherwise relevant. They held that there was error which was not purged by the law officer's instructions for the court-martial to consider the testimony concerning the adultery only as bearing upon the motive to commit murder.[102] Judge Ferguson in the majority opinion states in part:

> . . . [W]e note that his (trial counsel's) questions went precisely to the period of time alleged in the adultery specification and that he subsequently sought to elicit information concerning whether accused knew Mrs. Taylor was married. Thus, we are not at all certain whether he was using the argument of motive in order deliberately to obtain proof of guilt of the adultery specification.[103]

So perhaps the majority decided this case on the basis that the trial counsel, through the device of alleging an attempt to show motive, "forced" the accused to make a judicial confession of adultery. In the majority opinion no effort is made to reconcile the case of *United States v. Kelly*[104] which appears to be in conflict with the decision in the *Marymont* case. As in *Marymont*, the *Kelly* case concerned evidence of another offense that was relevant to the offense upon which the accused testified. In the *Kelly* case, cross-examination on the other relevant offense was held to be proper as distinguished from the holding in the *Marymont* case. It is difficult to reconcile the *Marymont* and *Kelly* decisions, although *Marymont* seems to stand for the proposition that separate and distinct offenses may not be combined to hamper or embarrass the

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[102] The Court of Military Appeals set aside the conviction of adultery, but affirmed the conviction of premeditated murder and the sentence pointing out: "It (the reversal of the adultery conviction) does not, however, affect the findings of guilty of premeditated murder, for, as hereinbefore noted, the absence of the Additional Charge (the adultery) would have permitted the fullest inquiry into accused's relationship with his paramour on the basis of establishing motive." 11 USCMA at 752, 29 CMR at 568.

[103] 11 USCMA at 751, 29 CMR at 567.

[104] 7 USCMA 218, 22 CMR 8 (1956).

accused in the presentation of his defense. In this sense there is a distinction between *Marymont and Kelly.*[105]

In support of its holding that a joinder of offenses may serve to limit the scope of cross-examination of an accused the majority opinion cites two federal court cases.[106] The Court then questioned whether, even under the liberal rules of joinder in military law, the joinder of the murder and adultery charges was proper by saying:

> . . . [A]ccused, by stating through his counsel that he had no motions to make and by affirmatively entering pleas of not guilty to both charges . . . [without objection to trial] effectively waived any error involved in their joint trial. . . . That counsel were aware of the possibility the charges should not be tried together is established by accused's pretrial objection to their joinder. Thus, the failure to pursue the matter at trial indicates a deliberate choice of tactics from which we should not grant relief at this level. Rather than decide the issue, therefore, we hold that the course of the accused's defense before the court-martial precludes any relief to which he might otherwise have been entitled.[107]

It appears, however, that, even under the restricted rules of joinder applicable in the federal courts that the offenses in the *Marymont* case could properly have been joined as "two or more sets of transactions connected together or constituting parts of a common scheme or plan."[108]

A board of review in *Pruitt*[109] placed a narrow interpretation on the *Marymont* case. In the *Pruitt* case, the accused was tried and convicted of unlawful cohabitation, of filing a fraudulent claim against the government for separate rations, of larceny by check and of making a false official statement in an emergency data form. The accused testified solely with respect to making

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[105] Another possible distinction between *Marymont* and *Kelly* is that in the latter case the accused brought out the matter which became the subject of cross-examination, while in *Marymont* the accused did *not* open up the subject.

[106] Finnegan v. United States, 204 F.2d 105 (8th Cir. 1953); United States v. Lotsch, 102 F.2d 35 (2d Cir. 1939).

[107] 11 USCMA at 748–49, 29 CMR at 564–65.

[108] Rule 8(a), Federal Rules of Criminal Procedure. If one believes that the majority in *Marymount* impliedly held that the offenses could not have been properly joined in the federal courts, it is arguable that the Court of Military Appeals was holding that the federal rule prohibiting joinder of offenses, so as to "embarrass an individual's defense" [Dolan v. United States, 133 Fed. 440, 446 (8th Cir. 1904)] is applicable to courts-martial, at least to limit the scope of cross-examination of an accused where there is a joinder of offenses made possible only because of the broader rules concerning joinder in the military law. A reference to federal cases concerning permissible joinder of offenses thus could be helpful to a cross-examiner who is trying to determine the permissible scope of cross-examination when an accused is attempting to testify upon less than all of the offenses charged.

[109] CM 403941, Pruitt, 30 CMR 457 (1960), *aff'd*, 12 USCMA 322, 30 CMR 322 (1960).

the false official statement in an attempt to establish the defense of entrapment. He was then asked on cross-examination whether he was living with a woman not his wife at the address on the emergency data form. This cross-examination followed testimony on direct examination that he had signed an emergency data form; that he knew his wife was living in Claudeville, Virginia, and not in Lawton, Oklahoma, as the form alleged; and that he submitted the new emergency data form at the direction of the company commander after the accused had told the company commander that his wife was living in Lawton, Oklahoma. The board of review, in holding that the cross-examination was proper, pointed out that the charges in the *Marymont* case were separate and distinct even though it was asserted that the adultery charge established a motive for the murder. The board held that in *Pruitt* the charges were so interrelated that the accused, in voluntarily testifying with respect to the false official statement, of necessity opened the door to cross-examination which tended to prove the unlawful cohabitation charge.[110]

C. *CONCLUSION*

The *Marymont* decision should be confined very narrowly to a factual situation in which the trial counsel proves an offense solely through the cross-examination of an accused as he did in the *Marymont* case. The danger, of course, in this type of case is that it will be cited as authority for a proposition as broad as the "headnotes" suggest rather than being limited to cases with this peculiar factual situation.

V. "LIMITED PURPOSE" TESTIMONY

> If the accused testifies on direct examination only as to matters not bearing upon the issue of his guilt or innocence of an offense for which he is being tried, he may not be cross-examined on the issue of guilt or innocence. Thus, if an accused testifies on direct examination only as to the involuntary nature of his confession or admission, he may not be asked on cross-examination to state whether his confession or admission was true or false, for such a question would go to the issue of his guilt or innocence, concerning which he has not testified.[111]

While frequently it is with respect to the voluntariness of a confession than an accused elects to testify for a limited purpose, and the Manual specifically sets out this example of a situation where an accused might testify for a limited purpose, it should

[110] The board of review, assuming arguendo that the cross-examination in the instant case extended beyond the limit enunciated in the *Marymont* case, held that there was no prejudice because of the compelling nature of proof concerning the offense of wrongful cohabitation.

[111] MCM, 1951, para. 149*b*(1).

not be implied that testimony concerning the voluntariness of a confession is the only type of "limited purpose" testimony. Testimony offered in support of a motion or testimony concerning the admissibility of evidence may be "limited purpose" testimony if it does not bear upon "the issue of his guilt or innocence of an offense for which he is being tried."

The prerequisite for the accused in limited purpose testimony is that he actually *succeed* in limiting his testimony. In *United States v. Wannenwetsch*,[112] the accused was found guilty of conspiracy to commit housebreaking, of housebreaking and of larceny. At the trial he took the stand for the "limited purpose" of authenticating a document and, on direct examination, was asked: "Q. Sgt. Wannenwetsch I hand you what has been marked Defense Exhibit 'B' for identification and ask you what it is if you know? A: Yes sir, it's a statement I wrote and placed in my locker box the night before I attempted suicide."[113] The trial counsel, over defense objection, was permitted to cross-examine the accused upon the issues of the accused's mental capacity and upon his credibility. A unanimous Court of Military Appeals held that the testimony placed the accused's mental capacity in issue by tending to negate the ability to form the specific intent required in the offenses charged and, consequently, that the cross-examination was proper, because the accused "was not seeking to keep adverse evidence out of the record, he was seeking to bring before the court-martial testimony which would and did rebut the prosecution's evidence on intent. . . . Hence the accused voluntarily and definitely introduced evidence which would have an impact on his guilt or innocence."[114] Although the Court of Military Appeals did not point this fact out, the question of whether the accused was trying to place evidence into the record or trying to keep it out of the record would not seem to affect the issue as long as the accused did, in fact, testify on a matter relevant to the issue of guilt or innocence as he did in the *Wannenwetsch* case.[115]

A. *SCOPE OF CROSS-EXAMINATION*

Although an accused is testifying for a limited purpose, he may still be cross-examined concerning all matters relevant to the

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[112] 12 USCMA 64, 30 CMR 64 (1960).

[113] NCM 6000269, Wannenwetsch, May 16, 1960 (quoted from board of review decision).

[114] 12 USCMA at 67, 30 CMR at 67.

[115] The Court of Military Appeals also held in *Wannenwetsch* that the law officer has no duty to inform the accused of any risk concerning the scope of cross-examination that he assumes in testifying before a court-martial when he has qualified counsel who can provide this advice.

issues to which he did testify. The Court of Military Appeals has pointed out that:

> It may be that in certain instances the answers might indirectly tend to connect the accused with the crime or to identify him as being a possible perpetrator of an offense, but if they are relevant to test his credibility, the questions are proper and must be answered.[116]

In *United States v. Hatchett*[117] the accused was charged with wrongful appropriation of an automobile and with larceny. The accused was apprehended in the company of other enlisted men when he attempted to drive the car onto the military reservation. He made a pretrial statement shortly after his arrest. At his trial he testified solely concerning the voluntary nature of this statement and alleged it was illegally obtained because: (1) he received an unlawful inducement by the investigator who promised that he could return to his unit if he made the statement, and (2) the statement was made between 2 a.m. and 2:30 a.m. so that he was so sleepy that he was not fully aware of the contents of the statement nor of his rights not to make any statement. The law officer questioned the accused concerning the number of people who were in the car when he was arrested, where he was arrested, how long he was kept at the military reservation gate, the length of time he was kept at the military police station, and whether he was the first man interviewed by the investigator. The Court of Military Appeals held that this line of questioning was proper because the matters were relevant concerning the voluntariness of his confession. The accused had alleged that he was sleepy when he made the statement and the questions showed the period of time which elapsed between his apprehension and the time at which he made the statement. He also alleged that he was induced to give the statement by a promise that he could return to his unit upon his giving a statement. The accused's testimony that he was the first to be questioned weakened this allegation because other evidence indicated that the men all returned to their unit at once and that, therefore, the accused waited for the others before returning to his unit.

In *United States v. Webb*,[118] an accused, charged with larceny of a camera, while testifying on the voluntariness of a confession, said that an investigator made an implied promise of leniency if he confessed. The investigator told him of two larceny cases, in one of which the accused admitted guilt and received a light sentence, while in the other case, the accused didn't admit guilt and received a more severe sentence. The accused testified that

[116] United States v. Hatchett, 2 USCMA 482, 486, 9 CMR 112, 116 (1953).
[117] 2 USCMA 482, 9 CMR 112 (1953).
[118] 1 USCMA 219, 2 CMR 125 (1953).

this story was told to him before he confessed. The investigator testified that the accused had already made an oral confession prior to the time that the story was mentioned. In view of this conflict of testimony, the Court of Military Appeals held that it was proper to ask the accused whether and when he had first admitted guilt of the offense charged.

In *United States v. Jackson,* [119] the accused was convicted of three specifications of larceny, one of which alleged larceny of a pair of shoes. While testifying concerning the voluntariness of the confession, he said that he had been kept barefoot in a military police station without sleep during the night prior to his making the confession. The allegedly stolen shoes were in evidence and a court member asked the accused if the shoes taken from him by the military police were the ones which were in court. The accused answered "yes" before the law officer could interrupt, but the law officer did instruct the court to disregard the question and answer as improper. The Court of Military Appeals pointed out that the information sought was not improper because, in the absence of any other explanation, the removal of the shoes might be inferred to be a device intended to weaken his resistence to confessing. Thus, evidence that the shoes were taken for evidentiary purposes was relevant to rebut this inference. The question as phrased was improper, but the fact that a court member rather than the trial counsel asked the question in the form used probably is the key to the Court of Military Appeals' finding of a lack of bad faith in asking the question in the form used. In the form used, the question probably would have been held to prejudice the accused if it had been asked by the trial counsel.

Although an accused testifying for a limited purpose may be asked questions relevant to the testimony which he has given, if there is a doubt whether or not he has succeeded in limiting his testimony, such doubt must be resolved in his favor. In *Fumai,* [120] the accused, on trial for larceny of watches, during his testimony concerning the voluntariness of a confession on direct examination, said: "I don't know nothing about it." [121] It was not clear whether the accused was referring to what he told the investigator at the time he made the statement or whether he was denying guilt. The trial counsel did not clear up the ambiguity in the accused's answer, and later a court member asked the accused if he signed the confession because it was true. The board of review held that,

[119] 3 USCMA 646, 14 CMR 64 (1954).
[120] CM 355969, Fumai, 7 CMR 151 (1952).
[121] *Id.* at 154.

in view of the ambiguity which should have been resolved in the accused's favor, the cross-examination was prejudicially erroneous.

B. *OUT-OF-COURT HEARINGS*

When an accused, testifying "only as to matters not bearing upon the issue of his guilt or innocence of an offense for which he is being tried" in fact does not succeed in limiting his testimony, but testifies concerning matters relevant to his guilt or innocence, he should be considered as having waived the privilege against self-incrimination and cross-examination should be permitted concerning matters relevant to the issues of guilt or innocence. To afford an accused an opportunity to proclaim his innocence under the guise of testifying for a limited purpose would be unjust to the government. Many times, however, the accused testifies as to a limited purpose in an out-of-court hearing,[122] and, if he should proclaim his innocence in an out-of-court hearing, the court members will not have heard his claim of innocence. In this situation, the waiver of the privilege against self-incrimination should be construed quite narrowly to favor the accused because such a claim in an out-of-court hearing would not damage the prosecution and questioning on the issue of guilt or innocence should not be permitted.

C. *"GOADING" AN ACCUSED INTO TESTIFYING ON THE MERITS*

When the accused testifies on a matter not bearing upon the issue of his guilt or innocence, such as the voluntariness of a confession, and after persistent questioning blurts out "Why would I confess to something that I didn't do?" he apparently has, by proclaiming his innocence of the offense, opened the door to complete cross-examination concerning guilt or innocence. However, if he has been "goaded" or tricked by the trial counsel into proclaiming his innocence, has he, in fact, "voluntarily" testified about an offense, so as to permit cross-examination on the merits? There are no military cases on this point in which an accused, badgered by a trial counsel, has proclaimed his innocence of an offense. There are, however, some federal court cases which are somewhat analogous to the situation. In these cases, it has been held that a prosecuting attorney, by skillfully securing a general denial of guilt from a witness, does not preclude the witness from relying upon his privilege against self-incrimination when con-

[122] United States v. Cates, 9 USCMA 480, 26 CMR 260 (1958).

fronted with specific details.[123] However, the analogy is not a complete one since these federal cases involved witnesses testifying at grand jury investigations where the prosecutor conducted the examination of witnesses entirely as in direct examination. In the inquisitory proceeding it is advantageous to have a narrow interpretation of the waiver of the privilege against self-incrimination as a policy matter in order to encourage witnesses to testify fully. In a court-martial, an adversary situation, to permit an accused to proclaim his innocence of the offenses and then to permit refuge from cross-examination on the merits by claiming that he has testified for a "limited purpose" would not be just to the Government. It is submitted that, if confronted with this problem, the Court of Military Appeals would hold that the accused simply had not succeeded in limiting his testimony and that he could be cross-examined concerning matters relevant to the issue of his guilt or innocence.

D. *CONCLUSIONS*

It may be concluded that an accused, testifying "only as to matters not bearing upon the issue of his guilt or innocence," must actually *succeed* in limiting his testimony to matters not bearing upon the issue of his guilt or innocence. However, if there is a doubt as to whether an accused has succeeded in limiting his testimony or has testified upon the merits, this doubt must be resolved in his favor. Although he is testifying for a limited purpose, the accused may be questioned as to all matters relevant to the *issues* to which he has testified even if his answers to the relevant questions may tend to connect him with the crime. He may also be examined as to his credibility.

If the accused is testifying as to a limited purpose at an out-of-court hearing, cross-examination concerning the merits of the case should not normally be permitted even if the accused has claimed his innocence of an offense because the government case has not been hurt, the court members not having heard the statement. On the other hand, a claim of innocence by an accused testifying in open court, even though the result of "goading" by the trial counsel, should "open the door" to cross-examination concerning the question of guilt or innocence. In this situation the court members have heard the claim of innocence and, because there is an adversary system in a court-martial, full examination should be permitted.

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[123] Isaacs v. United States, 256 F.2d 654 (8th Cir. 1958); Ballantyne v. United States, 237 F.2d 657 (5th Cir. 1956).

VI. CROSS-EXAMINATION FOR IMPEACHMENT

The bases for impeachment of witnesses, including the accused, in courts-martial are set out in the Manual[124] and in decided cases have been held to include: (1) bad moral character;[125] (2) conviction of a crime;[126] (3) acts of misconduct not resulting in a conviction;[127] (4) prior inconsistent statements;[128] and (5) prejudice and bias. Consideration will be limited to those problems arising *solely* as a result of the cross-examination of the accused. Impeachment by acts of misconduct not resulting in conviction will be discussed to include: (1) a comparison of the rule in federal courts with the rule in courts-martial; (2) a discussion of the types of acts of misconduct which are admissible to impeach; and (3) a discussion of the distinction between permitting the question concerning the act of misconduct to be asked and privileging the accused not to answer. Finally, errors in impeachment resulting from the form of the questions asked will be discussed.

A. *ACTS OF MISCONDUCT*

1. *Federal Courts*

In many of the federal courts an accused cannot be impeached by acts of misconduct not resulting in a conviction.[129] Still other federal courts, holding acts of misconduct admissible for impeachment, limit the rule to acts of misconduct which relate directly to the question of truth and veracity, and the trial judge has the discretion of determining the extent of such examination.[130] Such acts of misconduct are admissible when they have relevancy apart from the question of impeachment,[131] and the courts will admit such evidence if it has relevancy apart from the issue of credibility.[132]

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[124] MCM, 1951, para. 153*b*.

[125] United States v. Haimson, 5 USCMA 208, 17 CMR 208 (1954).

[126] United States v. Moore, 5 USCMA 687, 18 CMR 331 (1955).

[127] United States v. Hutchins, 6 USCMA 17, 19 CMR 143 (1955).

[128] United States v. Gandy, 5 USCMA 761, 19 CMR 57 (1955).

[129] United States v. Provoo, 215 F.2d 531 (2d Cir. 1954); United States v. Eckert, 188 F.2d 336 (8th Cir. 1951); Campion v. Brooks Transportation Company, 135 F.2d 652 (D.C. Cir. 1943); Ingram v. United States, 106 F.2d 683 (9th Cir. 1939).

[130] Simon v. United States, 123 F.2d 80 (4th Cir. 1941), *cert. denied*, 314 U.S. 694 (1941); Coulston v. United States, 51 F.2d 178 (10th Cir. 1931).

[131] 2 Wigmore, Evidence § 389 (3d ed. 1940).

[132] United States v. Brott, 264 F.2d 433 (2d Cir. 1959); Bell v. United States, 210 F.2d 711 (D.C. Cir. 1953), *cert. denied*, 347 U.S. 956 (1954); 353 U.S. 924 (1957); 356 U.S. 963 (1958); 362 U.S. 924 (1960).

2. *Military Law*

In considering the use in a court-martial of acts of misconduct not resulting in a conviction, one must differentiate two matters:

(1) permitting a question concerning an act of misconduct to be asked; and

(2) privileging an accused not to answer the question.

a. *Permitting Question To Be Asked*

The Manual says:

> It is generally not permissible to impeach a witness upon the ground that he has committed a crime affecting his credibility, by adducing—by means other than cross-examination of the witness—evidence not amounting to proof of conviction of the crime.[133]

The Court of Military Appeals in *United States v. Hutchins*[134] said:

> We have made clear that military law permits cross-examination calculated to bring out acts of misconduct on the part of a witness, although these have not resulted in conviction. . . . The test is simply one of whether the act of misconduct is a 'matter touching upon his worthiness of belief. . . .' To a considerable extent, of course, the administration of the matter must be left to the sound discretion of the law officer, and this Court will usually intervene only when it believes that it would be unreasonable to conclude that the act of misconduct in question would serve to affect credibility.[135]

In *United States v. Nicholson,*[136] the Court impliedly affirmed the authority to impeach an accused by acts of misconduct although it held that the acts of misconduct in that case were not of such a type as to diminish credibility. Again, in *United States v. Shepherd,*[137] the Court upheld the use of acts of misconduct to impeach when it pointed out that extrinsic evidence is inadmissible to prove acts of misconduct not resulting in conviction.[138]

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[133] MCM, 1951, para. 153*b*(2)(b).

[134] 6 USCMA 17, 19 CMR 143 (1955).

[135] *Id.* at 19, 19 CMR at 145.

[136] 8 USCMA 499, 25 CMR 3 (1957).

[137] 9 USCMA 90, 25 CMR 352 (1958) .

[138] It should be noted, however, that in United States v. Britt, 10 USCMA 557, 28 CMR 123 (1959), Chief Judge Quinn stated that he would reserve the question of whether the use of acts of misconduct not resulting in conviction are admissible to impeach an accused, indicating that he is open to argument on this issue. He cited MCM, 1951, para. 138*g*, at page 246, which states in pertinent part: "If the accused takes the stand as a witness, his credibility may be attacked as in the case of other witnesses. For this purpose, it may be shown *that he has been convicted* of a crime involving moral turpitude or otherwise affecting his credibility" (emphasis added). This provision indicated to him that it is arguable that a different rule was meant to apply in the case of an accused and an "ordinary" witness with respect to impeachment by acts of misconduct.

As to the types of misconduct which are admissible to impeach, in *Nicholson*, the Court of Military Appeals stressed that they must be of such a nature as to lessen the likelihood that the accused is telling the truth.[139] Acts of misconduct to impeach should meet the same standards as prior convictions in order to be admissible. The Court of Military Appeals in *United States v. Gibson*[140] held:

> . . . Although there appears to be some conflict between the two Manual provisions, as far as previous convictions are concerned, the restrictions of paragraph 153*b* (2) (b), *supra*, are not relaxed by those of paragraph 149*b*. Both make it clear that the 'conviction' or 'acts of misconduct' must involve moral turpitude or be such 'as otherwise to affect his credibility.'[141]

An act of misconduct may be so remote in time to the offense charged that it has little value in diminishing credibility. In *United States v. Moreno*,[142] the Court of Military Appeals held that independent evidence that an accused, charged with taking indecent liberties with children, had, eight years previously, admitted communicating obscene remarks to a telephone operator was inadmissible because the inflammatory nature of the evidence outweighed its value for diminishing credibility.

b. *Privileging Accused Not to Answer*

Assuming that a question concerning a prior act of misconduct not resulting in a conviction may properly be asked of an accused, can the accused be compelled to answer this incriminating question? In other words, by voluntarily testifying has he waived the testimonial privilege against self-incrimination as to matter merely bearing upon credibility? There are no decided cases of the Court of Military Appeals on this precise point. A Navy board of review encountered the problem in *Thacker*,[143] wherein the accused, on cross-examination, was questioned for impeachment concerning the use of marihuana and was compelled to answer the questions. The board of review found prejudicial error, but predicated its decision upon the fact that the acts of misconduct did not reflect on the accused's credibility, not on the basis of waiver of the privilege against self-incrimination.

Dean Wigmore states that the correct application of the testimonial waiver of the privilege against self-incrimination of an

[139] Acts of misconduct, presented in the *Nicholson* case, which were held to be inadmissible to impeach were: (1) attempting to create a riot; (2) repeated absences without leave; (3) threatening a sergeant; (4) leaving unattended a truck which accused had been assigned to drive; (5) smuggling letters into a stockade; and (6) breaking a cat's leg.

[140] 5 USCMA 699, 18 CMR 323 (1955).

[141] *Id.* at 703, 18 CMR at 327.

[142] 10 USCMA 406, 27 CMR 480 (1959).

[143] NCM 127, Thacker, 4 CMR 432 (1952).

accused is that, by testifying, the accused waives everything except as to matters merely affecting credibility.[144] The Manual does not state specifically whether an accused is privileged to refuse to answer a question concerning an act of misconduct not resulting in a conviction, but, it is submitted that a fair interpretation is that the Manual adopts the rule that a tesimonial waiver of the privilege against self-incrimination does not extend to matters solely affecting credibility. The Manual, in commenting generally upon the cross-examination of an accused, states that he "becomes subject to cross-examination upon the issues concerning which he has testified and upon the question of his credibility,"[145] but with reference to the question of waiver of the privilege against self-incrimination the Manual also says:

> When the accused voluntarily testifies about an offense for which he is being tried, . . . he thereby, *with respcet to cross-examination concerning that offense*, waives the privilege against self-incrimination, and any matter relevant to the issue of his guilt or innocence of such offense is properly the subject of cross-examination.[146]

It thus appears that the Manual is adopting the rule that the testimonial waiver by an accused of the privilege against self-incrimination does not extend to matters solely affecting credibility.

The interpretation limiting the testimonial waiver of the privilege against self-incrimination so that it doesn't extend to matters solely affecting credibility is consonant with justice. An accused's right to testify on his own behalf should not be conditioned upon a submission to a compulsion to confess to every act of misconduct which he may have committed. Moreover, tactically, from the government's point of view, the trial counsel has made his point concerning credibility when he has forced the accused to rely on his privilege against self-incrimination rather than to answer a question.

B. *FORM OF QUESTIONS ASKED*

The Court of Military Appeals has grown increasingly concerned in recent years with the methods used in impeaching an accused. Trial counsel have been accused of substituting insinuations, accusations and suspicions for proper impeaching questions. The Court of Military Appeals has said:

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[144] 8 Wigmore, Evidence § 2276 (3d ed. 1940).
[145] MCM, 1951, para. 149*b*(1).
[146] *Ibid* (emphasis added).

> . . . [P]rosecutors would do well to exercise more discrimination in attempting impeachment, particularly when, as in the instant proceeding, the advantages to the Government's case are so slim, when weighed against the dangers. . . .[147]

Often the mere form of the question asked results in error which, in the absence of compelling evidence, may be prejudicial to an accused.

1. *Questions Constituting Accusations*

Trial counsel must phrase his impeaching questions so as to avoid their being too specific and accusatory on one hand,[148] but on the other hand, he may make his questions as specific as necessary to compel a witness to give a responsive answer to the question asked.[149] Some examples of accusatory statements held to constitute error are:

> Isn't it a fact that you were convicted of highway robbery as a civilian?[150]

> Isn't it a fact that after you took her home you went somewhere and parked in your car with her?[151]

> Sergeant, you had been drinking? . . . Appeal does grow after a few drinks?[152]

> Have you ever directed any of your subordinates to take the motor from your car, or your car down to the Division Maintenance Shop and use Government parts in your motor without paying for them? . . . You have not? . . . This did not happen about the 1st of June?[153]

> Isn't it true that you wrote a check for $10.00 on 20 July 1952 to Mr. Hale E. Ryan's Liquor Store, Arroyo Grande, California, whereas you did not have sufficient funds?[154]

The error occurring in the use of this type of improper question will be tested for prejudicial effect and will not be considered to result in general prejudice.[155] If the trial counsel phrases impeaching questions so as to imply that the accused was convicted of a particular offense and, upon denial by the accused, fails to produce proof and appropriate remedial instructions are not given, error has been committed which may be prejudicial to the

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[147] United States v. Moreno, 10 USCMA 406, 409, 27 CMR 480, 483 (1959).
[148] United States v. Britt, 10 USCMA 557, 28 CMR 123 (1959).
[149] United States v. Gandy, 5 USCMA 761, 19 CMR 57 (1955).
[150] United States v. Russell, 3 USCMA 696, 701, 14 CMR 114, 119 (1954).
[151] NCM 386, Green, 18 CMR 439, 442 (1955).
[152] *Ibid.*
[153] United States v. Shepherd, 9 USCMA 90, 94, 25 CMR 352, 356 (1958).
[154] CM 362195, Dunlap, 10 CMR 319 (1953).
[155] United States v. Russell, 3 USCMA 696, 14 CMR 114 (1954); CM 362195, Dunlap, 10 CMR 319 (1953).

substantive rights of the accused.[156] If there is compelling evidence of guilt, however, the error is not prejudicial.[157]

2. *Questions Based Solely Upon Suspicions*

Questions, in which impeachment is predicated solely upon suspicion rather than upon a sound basis for believing that the accused has committed an act of misconduct, have been held to be erroneous and prejudicial, depending upon the compelling nature of the proof of guilt.[158] In *United States v. Hubbard*,[159] the accused was asked if he had ever been suspected of using narcotics and then asked if he had ever been apprehended by the criminal investigators. The Court of Military Appeals held that these questions offered only insinuations and suspicions as a substitute for an act of misconduct and that, because the evidence of guilt was not compelling, the error was prejudicial to the accused. In *United States v. Britt*,[160] the accused, convicted of the offense of receiving stolen goods, was questioned about 30 other larcenies of automobile parts to include:

> He was asked if he was 'accustomed' to selling things without the 'consent of the owner'; whether he had sold mirrors to Sergeant Elkins and to Specialist Munson; whether he stole 'wheels and tires off a car at Theater 1 in January of this year'; whether he had stolen clothing from 'cars parked at the NCO Academy'; whether he had stolen a spotlight off a car; whether he stole a battery from a car; did he 'ever strip any cars outside the main gate'; did he steal a water pump from the golf course in the Spring; whether he stole the hubcaps that were on a car which he traded; whether he stole fender skirts from a car at Service Club 4; did he 'strip a '51 or '52 Chevrolet and take a fuel pump' and other items; did he steal a radio from a 'wrecked' car belonging to Tarabelski.[161]

The Court of Military Appeals in this case emphasized that the trial counsel apparently had no sound basis from which to believe that the accused was guilty of the various offenses alleged. The Court consequently implied that the good faith on the part of the trial counsel in asking the questions is of importance in deciding whether error has occurred. In the *Britt* case, the inference was that the trial counsel questioned the accused about every unsolved larceny that had occurred on the military post in the period of time during which the offenses charged were committed.

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[156] ACM 4518, Wilkinson, 4 CMR 602, 606 (1952). It was held to be error where the trial counsel asked: "I call your attention to the 10th of November 1946 at St. Louis, Missouri. Were you then and there convicted of the crime of being a delinquent by larceny of auto?" The accused denied the accusation and no evidence of a conviction was offered by the prosecution.

[157] CM 366778, Bills, 13 CMR 407 (1953).

[158] United States v. Britt, 10 USCMA 557, 28 CMR 123 (1959); United States v. Hubbard, 5 USCMA 525, 18 CMR 149 (1955).

[159] 5 USCMA 525, 18 CMR 149 (1955).

[160] 10 USCMA 557, 28 CMR 123 (1959).

[161] *Id.* at 559, 28 CMR at 125.

C. *CONCLUSIONS AND RECOMMENDATION*

Although many federal courts prohibit the impeachment of an accused by acts of misconduct not resulting in a conviction, in military law such impeachment is permissible. It appears, although there are no decided cases directly on the point, that an accused in a court-martial cannot be compelled to answer a question asked solely for impeachment purposes concerning an act of misconduct because, by testifying, he has waived the privilege against self-incrimination only as to matters concerning his guilt or innocence and not to matters affecting merely his credibility. In impeaching by an act of misconduct, there must actually be an "act" and it must be one involving moral turpitude or one which affects credibility. In this regard the same standards which apply to prior convictions of crimes apply to the acts of misconduct. The trial counsel must be careful not to phrase his questions in the form of "accusations" or ask questions based solely upon "suspicions" or he may commit error, which may be held to be prejudicial. The trial counsel should have a reasonable basis for an opinion that the accused did, in fact, commit an act of misconduct as a predicate for asking the impeaching question. Because the trial counsel may easily commit error (1) if the act of misconduct is held to be one which does not affect credibility, or (2) if he asks an "accusatory" question without having substantial reasons to justify asking the question, it is recommended that "discretion is the better part of valor" and the trial counsel should never ask questions to impeach an accused upon acts of misconduct if he has any doubt whether the act of misconduct alleged is such as to affect credibility nor should he ask the question if it is predicated solely upon a "hunch" or "suspicion."

NATIONAL SOVEREIGNTY IN SPACE*

BY CAPTAIN GEORGE D. SCHRADER**

I. INTRODUCTION

Prior to the launching of the first lunar probe by the United States, President Eisenhower received a cable from a private citizen in one of the British dominions. The sender informed the President that he had properly filed claim to a certain area of the moon and intended to hold the United States responsible for any damage to his property caused by the probe. Soon after the Soviet Union launched their first satellite certain persons in the United States advocated that this nation make every effort to shoot down Sputnik I, which they claimed was violating United States sovereignty. Thus the generation of legal problems to perplex the space age was begun.

From this beginning it is easy to see that the legal problems facing the space age will be many and complex. Three of the more important problems concern (1) the sovereign rights of subjacent states in the space above their territory, (2) the organization which should formulate the ground rules for space activities and exercise jurisdiction in the area beyond the limits of national sovereignty, and (3) whether or not a comprehensive space code should be developed as opposed to allowing the law applicable to space to unfold by a process of evolution.

The rights of the subjacent state to exercise sovereignty in the space above its territory has received a great deal of attention during the past few years. Many noted authorities have contributed research papers on this subject and the United States Senate in 1961 prepared a comprehensive symposium dealing with this and other related subjects. The United Nations in 1958 appointed an Ad Hoc Committee on the Peaceful Uses of Outer Space to consider a multitude of problems in the area of space activities. Further the American Bar Association has appointed

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a special Space Law Committee and in February 1961 the Inter-American Bar Association adopted a Magna Charta of Space. However, even with all this tremendous amount of material there is little agreement either on the terminology for space law, or about the above cited problems.

The problem of conflicting sovereignty interests in airspace, space and outer space has been approached from various points of view ranging from law to national security. Further, there is an equal amount of conflict concerning the role to be played by the individual states as opposed to the United Nations as the sovereign body to regulate space activites. These are the two basic problems to be considered in the following sections which also include comments to a lesser degree on the proposition that a comprehensive space code should be adopted and that maritime law should be used as a guide for the formation of astronautical jurisprudence.

The main emphasis in this discussion is to be placed on the problem of national sovereignty in space because here lies the crux of all the related problems. If this one questionable area can be isolated and properly disposed of, then there is certainly hope for the agreeable solution of other problem areas. The discussion of theories on extraterrestrial sovereignty contained in Section III, *infra*, considers a wide variety of proposals and an attempt to corrolate those which adhere to the same basic principal that state sovereignty does have an upper limit. In this vein, once the sovereign rights of the subjacent states are specifically defined the exploration of space and outer space can progress in an orderly fashion.

Upon solution of that problem, the appointment of an organization to act as the governing body above the area of state control and to formulate rules and regulations for space activities is next in line. If this can be accomplished, the struggle for space control or the claims to celestial bodies by terrestrial nations can be eliminated. If this is possible through orderly agreement, the nations on the earth may explore and develop the planetary system for the benefit of all mankind.

II. SOVEREIGNTY IN AIR SPACE—THE BACKGROUND

A. *LEGAL TERMINOLOGY*

The year 1961 will be recorded in history as the year man himself entered the space age. This will bring forth many new and also some very old legal problems. One of these problems will be that of establishing definitions in the law for describing

the various regions of the atmosphere and the area beyond the atmosphere.

> Astronautical jurisprudence is a new field of law, and it raises some basic questions which must soon be answered, namely: What, in law, is meant by the term 'airspace?' What are the scientific divisions of the upper regions of the earth's atmosphere? How does 'space' differ from 'outer space,' 'world space,' 'territorial space,' 'contiguous space,' 'terrestrial space,' etc.?[1]

The word airspace which has been used frequently in cases dealing with disputes between landowners and aviators has never been fully defined either in the law or by an international convention dealing in this problem area. Further, the words airspace, space, and outer space are used interchangeably which indicates a need for standard terminology in the field of astronautical law.

The popular conception is to divide the area above the earth's surface into definite sections. Therefore, it is submitted that adopting the term flight space as synonymous with the term atmosphere may be a solution. The atmosphere actually has no limits but grows so thin at approximately 21,000 miles above sea level that traces of air become imperceptible.[2] Thus, at this height there exists a point of departure for outer space that is out of the earth's atmosphere.

The flight space or earth's atmosphere could then be divided into two areas "airspace" (territorial space) and "space." (See Appendix A, *infra.*) The dividing line would be rather flexible as airspace would be defined as only those areas where sufficient gaseous atmosphere exists to provide aerodynamic lift for flight instrumentalities such as balloons and aircraft.[3] The upper limit would be the von Karman Primary Jurisdiction Line which will be discussed in Section III, *infra.* This would be at an altitude of approximately 60–70 miles above the earth's surface. The area above this line would be referred to as "space" and provide transit for flight instruments such as guided missiles, satellites and spaceships prior to leaving the earth's atmosphere.

"Outer space" has been referred to as "world space," "extra atmospheric" and "cosmic space;" therefore, a standard terminology for the upper regions beyond the atmosphere is evident. John C. Hogan of the Rand Corporation advocates that terms based on the nomenclature of astronomy could be used in the law

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[1] Hogan, *Legal Terminology for the Upper Regions of the Atmosphere and for Space Beyond the Atmosphere,* 51 Am. J. Int'l L. 362 (1957).

[2] *Ibid.*

[3] Cooper, *Missiles and Satellites: The Law and Our National Policy,* 44 A.B.A.J. 317, 321 (1958).

for referring to areas of outer space.[4] He submits that the solar system, as used in astronomy to refer to the sun and the several bodies that rotate around it, could be termed in astronautical law as "Solar Space." In addition, the galactic system more commonly known as the "Milky Way" would be termed galactic space, while the area beyond would be referred to as extragalactic space. (See Appendix A, *infra.*)

This would then establish a sound terminology for the field of astronautical law to follow based on the field of astronomy. Further the adoption of this terminology as it applies to flight space and outer space would establish uniformity in a presently most confused area.

B. *EARLY THEORIES*

The early 1900's found three major theories regarding freedom of the air under discussion by interested organizations. The Institute of International Law meeting in Ghent in 1906 took up the subject and the proposed theories. Paul Fauchille, the French delegate, advanced the theory that the air was free subject to a zone limitation.[5] He advocated that the first zone, that nearest the earth, could be used for the construction of buildings. The second zone, between 330 meters and 5,000 meters, would be open to free flight. The space above 5000 meters at that time was inaccessible by aircraft. He also felt that flights under 1,500 meters might be prohibited for security purposes.

In opposition to this proposal were those who advocated that the air was free and not subject to the control of any state. Also there were those who proposed that the air was subject to the sovereignty of the subjacent state. After the various proposals were given consideration the assembly of the Institute in effect adopted Fauchille's theory stating, "The air is free. States have in it, in times of peace and in times of war, only the rights necessary to their conservation."[6]

The Institute of International Law considered the same question in their meeting in 1910 and then in 1911 broadened the above statement to allow the subjacent states to take certain measures to insure their security and to protect the persons and property of their inhabitants.[7] This proposal brought criticism from various

[4] Hogan, *supra* note 1.

[5] See Legis. Ref. Serv., Library of Congress, *Legal Problems of Space Exploration—A Symposium*, S. Doc. No. 26, 87th Cong., 1st Sess. 1219 (1961) (hereinafter cited as S. Doc. No. 26).

[6] S. Doc. No. 26, at 1220.

[7] *Ibid.*

sources including the International Law Association. This organization in 1911 advocated that every state had the right to enact prohibitions and regulations as it deemed proper with regard to the passage of aircraft through the airspace above its territories and territorial waters.[8]

Thus it is interesting to note that within a few short years the seriousness of the problem of "freedom of the air" began to gain more attention as man realized the potential associated with the increase in aviation. Further, none of these meetings were official diplomatic conferences, but the ensuing war which saw aviation come of age indicated a need for such a conference.

C. *THE PARIS CONVENTIONS*

1919

In 1919, as a result of the Paris Peace Conference at the end of World War I, the world powers organized a convention to discuss the question of aerial navigation and national sovereignty. The United States was represented on the aeronautical commission of the peace conference, which formulated the ground rules for the convention, by Rear Admiral Knapp and Major General Mason Patrick. Although the United States representatives worked actively in drafting the convention and later signed it, the United States Congress did not ratify it.[9]

There are three articles adopted by the convention which are of material importance and recognized as basic in the area of national sovereignty in airspace. Article I provides "The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the airspace above its territory."[10]

As noted previously the term airspace was not defined by the convention but, regardless of its meaning, the verbage of Article I acknowledges the sovereignty of the subjacent states to the "airspace" over its land and territorial waters, which must also include the right to exclude foreign aircraft.

Article II provided in essence that in time of peace each nation should accord freedom of innocent passage over and above its territory to the aircraft of other nations. This has been interpreted to accord a general right of free passage for special flights such as private air flights or isolated commercial flights without prior approval by the subjacent state.[11] This is to be distinguished

[8] *Id.* at 1221.
[9] See Cooper, *The Rule of Law in Outer Space*, 47 A.B.A.J. 23 (1961).
[10] *Ibid.*
[11] S. Doc. No. 26, at 1223.

from regular commercial air flights which might be considered to follow an established international airway.

Article XV concerned the establishment of international airways and granted the right to cross the airspace of each contracting nation without landing, if following routes fixed by the subjacent state. Further, the last paragraph provided that the establishment of international airways was subject to the consent of the subjacent state.[12]

This then gave rise to the controversy as to whether the subjacent state had to give prior consent to the operation of a foreign air carrier over its territory or, if once an international airway was designated, the air carriers of other contracting nations would have a general right of flight over such route. This question was the subject of much debate until the International Commission for Air Navigation, acting under authority of the original convention, held a meeting in Paris in 1929 for the purpose of considering amendments to the former convention. This convention adopted the resolution that the establishment of international airways was subject to the consent of the subjacent state. And, further, the operation of international airlines over these airways was subject to the same restriction. Thus, regular or scheduled foreign aircraft could not fly across territory without the permission of the subjacent state, regardless of other verbage in the articles of the convention and the fact that international airways had been established.

D. *CHICAGO CONVENTION*
1944

The ambiguities of the Paris Convention concerning the entry of foreign aircraft were not totally cured by the Habana Convention of 1928 nor any other international meeting. Thus the interested nations proposed a conference be held in Chicago in 1944, which was to be the most important international aviation conference held up to that time.

As the Paris Convention had established the concept of sovereignty as opposed to the concept of freedom of the airspace above the subjacent state, the Habana Convention reaffirmed this concept. A similar provision was included in Article I of the Chicago Civil Aviation Convention.[13] In addition, this principle has been so firmly established throughout the world by international agree-

[12] *Ibid.*

[13] Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 (effective April 4, 1947).

ment and domestic legislation that it is no longer questioned. It is interesting to note that while the United States did not ratify the Paris Convention it did ratify both the Habana and Chicago conventions, while the Soviet Union failed to participate in or ratify any of the conventions.

Although these various conventions failed to define the term "airspace," it can be assumed that they were referring to the area in which man could fly an aircraft and not an area beyond such as has been previously referred to as space.[14]

Article 15 of the Paris Convention, as amended in 1929, refers to pilotless aircraft as follows:

> No aircraft of a contracting state capable of being flown without a pilot shall, except by special authorization, fly without a pilot over the territory of another contracting state.[15]

Article 8 of the Chicago Convention contained similar verbage and while they may not apply to space vehicles such as "Sputniks" and "Explorers" there is an indication of a prohibition against the entry of unmanned vehicles into airspace.

This then brings us to today's problem, because neither the Soviet Union nor the United States sought the permission of any nation prior to launching their space projects. As a practical matter Russia and the United States appear to be following a logical course of action. It would be almost impossible to secure the consent of other nations prior to launching a space vehicle, and because of the lack of control and vast areas over which they orbit this would require the consent of every nation. Further, failure of other nations to complain concerning the violation of their sovereignty may indicate the method adopted by these two nations has become an accepted international practice.

Thus, regardless of the rule of national sovereignty as established by the Paris and Chicago conventions, and the prohibition against unmanned aircraft set forth by these conventions, we find they as yet do not apply to space. Stephen Latchford, an advisor to the United States delegation to the Chicago Convention, has requested that another international convention be held to reconcile the sovereignty provision of the Chicago Convention with an international agreement for the use of space.

> Such a conference might tend to clarify the atmosphere, or the controversial airspace, and thus bring the experts back to earth long enough to get their bearings. The legal profession should then be in a

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[14] Latchford, *The Bearing of International Air Navigation Conventions on the Use of Outer Space*, 53 Am. J. Int'l L. 405 (1959).

[15] S. Doc. No. 26, at 1226.

better position to develop the legal principles to be applied to outer space.[16]

Such a convention might well be the answer to problems, as the situation may continue indefinitely unless there is some international agreement as to the principles of national sovereignty which are to be applicable to space.

E. *THE UNITED STATES POSITION*

The position of the United States concerning the problem of sovereignty in airspace and space can be found in three basic declarations. The first is the Air Commerce Act of 1926[17] and the subsequent Federal Aviation Act of 1958,[18] which proclaimed United States sovereignty over the airspace above this nation. The latter act provided:

> The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States.[19]

Apparently these statutes apply to airspace in the same sense as that word is used in the Chicago Convention because it is not defined here either. Further, the additional declarations are more applicable to space or an area beyond that used by conventional aircraft. Therefore, the United States has declared that it maintains jurisdiction over the airspace above its territory, at least to a height where such jurisdiction can be enforced.

The second declaration is set forth in the National Aeronautics and Space Act of 1958,[20] which states the policy of the United States to be one devoted to peaceful activities in space for the benefit of all mankind. Thus this nation took the position of rejecting sovereignty rights in space by way of domestic legislation, thereby acknowledging that there is a dividing line between airspace and space. As yet this nation has not attempted to fix any hypothetical altitude as the beginning of space, but in connection with the International Geophysical Year served notice that all space above 300 miles is free space.[21]

The third declaration of the United States concerning sovereignty in space was made before the United Nations Ad Hoc Com-

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[16] Latchford, *supra* note 14, at 411.
[17] Act of May 20, 1926, ch. 344, § 10, 44 Stat. 568, as amended.
[18] Enacted as Public Law 85–726, 72 Stat. 731 (1958), 49 U.S.C. §§ 1301–1542 (1958).
[19] *Ibid.*
[20] 72 Stat. 426–38 (1958), 42 U.S.C. §§ 2451–2459 (1958).
[21] Cox and Stoiko, Spacepower 199 (1958).

mittee on the Peaceful Uses of Outer Space by former representative Henry Cabot Lodge, who stated:

> Our task is to help to chart for the United Nations a course of cooperation among nations in the use of outer space for peace.
>
> In no field of endeavor is cooperation among nations more necessary. When we go about the business of exploring the universe, the rivalries of men and nations really do look petty and ridiculous. . . .
>
> The job is far too big for any one nation, no matter how big or how advanced in technology that nation may be. . . .[22]

In addition, President Eisenhower addressed the United Nations General Assembly on September 22, 1960, and proposed the following:

> 1. We agree that celestial bodies are not subject to national appropriation by any claims of sovereignty.
>
> 2. We agree that the nations of the world shall not engage in warlike activities on these bodies.
>
> 3. We agree, subject to appropriate verification, that no nation will put into orbit or station in outer space weapons of mass destruction. All launchings of spacecraft should be verified in advance by the United Nations.
>
> 4. We press forward with a program of international cooperation for constructive peaceful uses of outer space under the United Nations.
>
> Agreement in these proposals would enable future generations to find peaceful and scientific progress, not another fearful dimension to the arms race, as they explore the universe.[23]

Thus, we find the position of the United States to be of a dual nature. National sovereignty is proclaimed by the way of domestic legislation over the airspace above the United States, but neither the limits thereof nor a definition of airspace is established as a matter of record. On the other hand, the United States advocates the peaceful use of space by all nations concerned and has frequently voiced this proposition before the United Nations.

F. *THE RUSSIAN POSITION*

The Soviet position concerning national sovereignty in space is based on statute, and Communist philosophy. Article 1 of the Soviet Air Code of August 7, 1935, states, "To the Union of Soviet Socialist Republics belongs complete and exclusive sovereignty in the airspace above the Union of Soviet Socialist Republics." [24] This statement of an accepted rule of law is not unlike similar verbage in the United States Air Commerce Act or comparable legislation previously enacted by a large number of nations. How-

[22] N. Y. Times, May 17, 1959.
[23] 43 Dep't State Bull. 551, 554–55 (1960).
[24] S. Doc. No. 26, at 1118.

ever, the Soviet method of enforcing its right of sovereignty has been more forceful over the past fifteen years than the methods used by other nations.

One of the leading Soviet authorities on space law, E. Korovin, in an article entitled "International Status of Cosmic Space,"[25] discussed the application of the theory of national sovereignty as set forth by the Chicago Convention. In analyzing this theory, he concluded that it had nothing whatsoever to do with the status of space, and thus once beyond atmospheric limits, recognition of national sovereignty is illogical.[26] The Soviet authorities apparently have not attempted to establish a specific altitude as the extent of sovereignty. However, there is some indication that two limitations are proposed: the first is that sovereignty can be exercised no higher than it can be effectively enforced; the second blends the right to sovereignty with that of national security. Dr. Zadorozhnyy, a noted Soviet authority, stated in late 1960 that the maximum ceiling of sovereignty should be at a point where satellites are no longer slowed down by the atmosphere but that every nation had a right to prevent espionage in outer space.[27]

This is typical of the Soviet position, which, as was stated before, is heavily politically oriented. Seldom do the Soviet scholars approach the problem without voicing Communist concepts and doctrine. Their treatment of the subject is resplendent with attacks against the United States and consistently condemns any proposal for space control by international organizations, which it claims are dominated by anti-Communist states.

Thus, in the final analysis, the Soviet position is one of flexibility depending on the Communist concepts that prevail, but it never disregards the proposition of national security or the international right to self-defense, if its arguments cannot be supported by international law or based on a right of sovereignty.

III. A SURVEY OF EXTRATERRESTRIAL SOVEREIGNTY

> The authority of a nation within its own territory is absolute and exclusive. . . . But its power to secure itself from injury may certainly be exercised beyond the limits of its territory.[28]

The Cooper Theory. The emminent authority on space law, Professor John Cobb Cooper, has proposed a multipoint program

[25] Reprinted in S. Doc. No. 26, at 1062.
[26] *Id.* at 1064.
[27] S. Doc. No. 26, at 1015.
[28] Chief Justice John Marshall in Church v. Hubbart, 6 U.S. (2 Cranch) 249 (1804).

to solve the present perplexing problem of national sovereignty in space. Mr. Cooper first distinguishes the areas commonly referred to as airspace as opposed to outer space. It is his contention that the Paris Convention of 1919 and the Chicago Convention of 1944 intended the term "airspace" to include "only those parts of the atmosphere above the surface of the earth where gaseous air is sufficiently dense to provide aerodynamic lift for balloons and airplanes, the only types of aircraft in existence when those conventions were drafted."[29] Thus a rather logical and reasonable definition of the term airspace is set forth even though the two conventions were void on the subject.

Professor Cooper then submits that the air above the earth's surface should be divided into various zones similar to the manner in which maritime law divides the oceans. (See Section IV, *infra.*) This approach is not entirely new and it has been opposed on various grounds such as: (1) There is no proper analogy between the sea and space; and (2) the zone theory violates the intent of various international flight agreements and it is not susceptible to implementation.[30] Although there is some merit in each of the various criticisms, Professor Cooper still maintains a rather formidable position considering the present status of the law in this area.

The first zone (see Appendix C, *infra*) is called "territorial space," and in this area the subjacent states would exercise full sovereign powers. This zone would extend to a point above the earth's surface where aircraft could be operated, or to the upper limits of "airspace" as defined previously. This limitation would be rather flexible in the sense that aircraft will continue to be developed until such time as they reach the height where gaseous air is no longer sufficiently dense to provide aerodymanic lift.

The second zone would be known as "contiguous space," and it would extend from the highest limits of territorial space to the lower limits of "outer space" as defined by Professor Cooper. This area would slowly be absorbed by territorial space for the reason stated above. Until that time it would be free for the passage of all flight instruments.[31]

The third zone would be "outer space" and as submitted by Professor Cooper:

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[29] Cooper, *supra* note 3, at 319.

[30] See Bookout, *Conflicting Sovereignty Interests in Outer Space: Proposed Solutions Remain in Orbit!*, Mil. L. Rev., January 1960, p. 23, 36.

[31] See Cox and Stoiko, *op. cit. supra* note 21, at 164.

> If the lower boundary of outer space is fixed by international agreement as the lowest altitude above the earth's surface at which an artificial satellite may be put in orbit around the earth, we should then have more than a mere theoretical boundary.[32]

In support of this theory Professor Cooper submits that below this boundary, objects moving toward the earth from outer space would be subject to destruction from atmospheric heat. Above this boundary satellites could orbit without atmospheric interference and unsubjected to state restriction. A fixed line separating contiguous space from outer space might be rather difficult to establish except for the fact that recent satellite flights have indicated that a minimum altitude of seventy miles is all too dense for a satellite to pursue an orbit.[33]

Thus Professor Cooper has proposed a very logical solution to the problem. Although he depends on artificial boundries at variable points above the earth's surface, he has relied on atmospheric conditions to give these points a definite position in relation to the earth's surface. In essence he is advocating that man has a right of sovereignty to the point where atmospheric lift fails to aid his passage. Once this aid ceases to exist then outer space begins.

The Karman Primary Jurisdiction Line. Andrew G. Haley, past president and now general counsel of the International Astronautical Federation and general counsel of the American Rocket Society, has proposed a most logical solution to this dilemma of sovereignty in space. This outstanding authority contends that the term "airspace," as used in the Paris and Chicago conventions, was couched in terms of present day aircraft which derive support in the atmosphere from reaction of the air.[34]

Haley submits that to separate airspace from space or outer space by an absolute rigid line would not be possible. Thus his theory is to adopt a flexible line which he terms "the Karman Primary Jurisdiction Line." This line is based on a curve and falls at approximately 275,000 feet (52 miles) above the earth's surface where an object traveling at 25,000 feet per second loses aerodynamic lift and centrifugal force takes over.[35] (See Appendix A, *infra.*)

As this line is rather flexible its recognition will come only after physicists and lawyers work out the possible ramifications based

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[32] Cooper, *supra* note 9, at 24.
[33] *Ibid.*
[34] Haley, *Survey of Legal Opinion on Extra-terrestrial Jurisdiction*, reprinted in S. Doc. No. 26, at 719–20.
[35] *Id.* at 723.

on the termination of the efficient performance of an aeronautical vehicle. In support of this theory Haley states:

> The basic advantage of a criterion such as the Karman Line lies in its practical application—it effectively separates the territory of air-breathing vehicles from that of rocket vehicles.[36]

Thus Haley uses as a basis for the Karman Line the characteristics of the air-breathing aircraft. His critics challenge his position by citing the X–15 as an aircraft which may some day go more than twice the altitude at which aerodynamic lift ceases and may even reach the heights of some of the satellites, approximately 150 miles. To this challenge Haley adequately responds, pointing out that the X-15 is purely a rocket-type vehicle with no air-breathing devices. He further contends that just because the X–15 or like vehicles use air guidance surfaces during their departure from and return into the areas below the Karman Line does not make them any less a space vehicle and thus cannot be classed as air-breathing.[37]

Professor Cooper, in effect, supports the Karman Line theory with his definition of airspace as that area "where gaseous air is sufficiently dense to provide aerodynamic lift. . . ." [38] Further, the Karman Line, if not too rigidly drawn, may also be the lowest altitude above the earth's surface at which an artificial satellite may be put in orbit, thereby eliminating a need for an area known as contiguous space, which is one of the three areas proposed by Professor Cooper.

Haley also finds some support for his Karman Line theory from the Federation Astronautique Internationale which, in agreement with both United States and Soviet representatives, has defined space flight as being above 62 miles or 100 kilometers.[39] Thus at this point, which does coincide with the Karman Primary Jurisdiction Line, aircraft flight must end and space flight begin.

Therefore, Haley, by a very logical approach, establishes two basic needs—first, a definition of airspace which has as a point of departure a feasible area susceptible to both concurrent legal and physical determination, and secondly, an area in which subjacent states can exercise their sovereign rights within limits presently accepted by international law.

The Heinrich Theory. Dr. Welf Heinrich, grandson of Kaiser Wilhelm and presently Prince of Hanover, contributed a commend-

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[36] *Ibid.*
[37] *Id.* at 720–21.
[38] Cooper, *supra* note 3, at 319.
[39] See S. Doc. No. 26, at 724.

able research paper to the field of astronautical jurisprudence in 1953 entitled, "Air Law and Space." [40] This effort is recognized as a pioneer work in the field and even though there has been a tremendous advancement in space activity since 1953, the work of Dr. Heinrich has not lost its importance.

Dr. Heinrich, in his evalution of the elusive area known as "airspace," contends that it pertains to the area above the earth's atmosphere which is air-filled and extends to a height of approximately 300 kilometers or 186 miles.[41] He submits that above this line is space above the atmosphere, thus using airspace as synonymous with atmosphere.

This contention is subject to criticism, as atmosphere has been defined as "The body of air which surrounds the earth." [42] This is a rather nebulous definition, and it is here submitted (see Section II, *supra*, and Appendix A, *infra*) that the atmosphere extends to a height of approximately 21,000 miles above the earth's surface. Furthermore, Lieutenant Colonel Hal H. Bookout, in his thesis presented to the Army's Judge Advocate General's School, stated:

> It is presently unknown to the scientific community how far the presence of air particles extends into the atmosphere. Without reporting all of the beliefs that exist on this subject, let it be sufficient for our purpose to conclude that when suggested distances range upward from 1000 to 200,000 miles away from the earth's surface, the legal profession cannot be expected to make an arbitrary choice from the array.[43]

Thus it does not appear very logical or practical to define the term airspace as extending to the limits of the atmosphere, thereby making the two terms synonymous.

By his definition of the term "airspace," Dr. Heinrich concedes that national sovereignty cannot be extended beyond that point above the subjacent state and its territorial waters.

> Only the air-filled regions are so connected with life on the surface of the earth, that they may be considered part of it. 'This correlation determined by considerations of space and sovereignty' however, does not exist between the area beyond the atmosphere and the lands and waters underneath it. Thus the area beyond the atmosphere cannot be considered an 'integral part' of any national territory.[44]

In support of his position he argues that there must be two conditions precedent to a nation's exercising its sovereignty over a certain area, and these are (1) frontiers capable of determination

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[40] Reprinted in S. Doc. No. 26, at 271.
[41] *Ibid.*
[42] Air University, U.S. Dep't of Air Force, The United States Air Force Dictionary 58 (1956).
[43] Bookout, *supra* note 30, at 38.
[44] S. Doc. No. 26, at 317.

and (2) the possibility of exercising effective control. Although he does not deny that subjacent states may have an interest in the area beyond what he defines as "airspace," he does have an excellent point concerning the lack of determinable boundries and present inability to exercise control therein. Further his position in this regard is strengthened with the additional argument that the solar and galactic systems are in perpetual motion. The extending of vertical frontiers from the earth's surface into this area would be impossible.

In conclusion, Dr. Heinrich's position (that the area beyond airspace, as he defines it, is to be "free territory" and not subject to the sovereignty of the subjacent state) is supported by most authorities in the field and the various international conventions previously discussed. The real area of contention is the limit he places on airspace, which is 300 kilometers. Such a limitation is purely arbitrary and certainly not subject to physical determination in the same sense as the Karman Primary Jurisdiction Line discussed previously.

The Airspace Theory. Oscar Schachter, the noted English international lawyer and Director of the General Legal Division of the United Nations, has advocated the "Airspace Theory."[45] This theory maintains that national sovereignty should be extended to a height determined in terms of the atmospheric elements necessary to lift present day aircraft. This line is rather difficult to fix because of the limits within which aircraft operate, but 25 miles is about the maximum height at this time. The future will surely bring forth aircraft that can exceed this figure and here we find the same problem as discussed previously—the distinction between air-breathing and rocket-type aircraft. If we are to follow the argument of Haley, then rocket-type aircraft are not to be considered in establishing the height of national sovereignty. This, it would seem, is a very valid position. Thus it is assumed that Schachter did not intend to include rocket-type aircraft in the terminology of present day aircraft.

This then brings us to the point of issue between Haley's Karman Primary Jurisdiction Line and Schachter's "Airspace Theory." The latter stated in 1958: ". . . the territorial 'airspace,' as mentioned in the Paris and Chicago conventions, does not extend outside the limits of the atmosphere contributing to the lift or support of aircraft."[46] Therefore, he was in effect acknowledging

[45] Schachter, *A Preview of Space Law Problems Warning: Early Unilateral Positions*, reprinted in S. Doc. No. 26, at 345. See also Cox and Stoiko, *op. cit. supra* note 21, at 159.

[46] S. Doc. No. 26, at 347.

the Karman Primary Jurisdictional Line, which is where an object loses its aerodynamic lift and centrifugal force takes over (approximately 52 miles). Thus perhaps the only difference between these two noted authorities lies in the present day inability of air-breathing aircraft to reach the height necessary to lose all the atmospheric elements of aerodynamic lift.

If this anology is proper then it is only a matter of time until the two authorities agree on the limits of national sovereignty.

Schachter himself stated that "An effort to fix the delimitation of the upper boundary on the basis of speculative possibilities could result in decisions which would unreasonably restrict and impede scientific research. . . ." [47] Thus it would seem that he would be more in favor of the Karman Primary Jurisdiction Line because it is based on scientific data, capable of positive recognition, does not restrict or impede scientific research and meets the criteria set forth in his own "Airspace Theory."

The Free Space Theory. Dr. C. Wilfred Jenks, an associate of the Institution of International Law at Cambridge, England, has proposed the "Free Space Theory" in his paper entitled, "International Law and Activities in Space." [48] In his treatment of the subject Dr. Jenks deals mainly with the problem of the legal status of space, defining space as that area beyond the earth's atmosphere. Further, he limits the atmosphere by stating that it is below the ionosphere, which is the zone presently used by earth satellites and approximately 70 miles above the earth's surface.[49] Thus Dr. Jenks is using atmosphere as synonymous with airspace when he states that sovereignty over airspace is well established but:

> [T]he projection of the territorial sovereignty of a state beyond the atmosphere above its territory would be so wholly out of relation to the scale of the universe as to be ridiculous; it would be rather like the Island of St. Helena claiming jurisdiction over the Atlantic.[50]

Dr. Jenks, by drawing the line between airspace and space at the beginning of the ionosphere, has in effect acknowledged the Karman Primary Jurisdictional Line as the boundary between territorial space or airspace and space. However, his use of the word atmosphere as synonymous with airspace is misleading.

The earth's atmosphere is composed of four gaseous layers—the troposphere, the stratosphere, the mesosphere and thermosphere, generally called the ionosphere, and the exosphere. (See

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[47] *Ibid.*
[48] 5 Int'l & Comp. L.Q. 99 (1956).
[49] See Jessup and Taubenfeld, Controls for Outer Space 129 (1959).
[50] Jenks, *supra* note 48, at 103.

Appendix D, *infra.*) The latter extends to a height approximately 21,000 miles above the earth's surface. Thus to use the all-inclusive term atmosphere as the area of territorial sovereignty would appear to be out of place.

In dealing with the area beyond territorial space, Dr. Jenks has proposed a very valid theory by stating, "By reason of the basic astronomical facts, space beyond the atmosphere of the earth is and must always be a *res extra commercium* incapable of appropriation by the projection into such space of any particular sovereignty based on a fraction of the earth's surface." [51]

In support of this theory he joins with Dr. Heinrich in his argument that nothing in the universe is constant and to project particular sovereignties on the surface of the earth into space would give rise to a constantly changing concept in the application thereof. The revolution of the earth and its rotation around the sun and the movement of the planets through the galaxy indicate how futile it would be to attempt the extension of sovereignty beyond airspace.

In an attempt to solve the problem of control of space, Dr. Jenks submits that it should be considered as a world problem and that every effort should be made to develop a reasonable program towards the solution of present and future problems. He contends that space has a legal status similar to the high seas and that the United Nations should be vested with jurisdiction and authority over the activities conducted in space. These two subjects will be discussed later.

In conclusion, it appears that Dr. Jenks would limit the sovereignty of the subjacent state to that area which would fall below the Karman Primary Jurisdictional Line and is thereby in agreement with Haley. In addition his "Free Space Theory" concerning the area above the Karman Line is extremely valid and certainly supported by the weight of authority.

Soviet and Communist Views. Turning now to the views of some of the Soviet and other Communist authorities on the subject of astronautical jurisprudence we find two problems. The first is determining just what is the theory or position these authorities advocate. The second is excluding the Communist political attacks on the theories advocated by authorities such as Andrew G. Haley and John C. Cooper, whose views the Russians claim are strictly beneficial to capitalism.

A list of leading Soviet specialists in this field would include E. Korovin, A. Kislov and S. Krylov. The latter two gentlemen, in

[51] *Ibid.*

a joint article entitled "State Sovereignty in Airspace,"[52] discuss the present Soviet Air Code, which grants complete and exclusive sovereignty in the airspace above the Soviet Union to the Union of Soviet Socialists Republics. This is, of course, similar to existing legislation in the United States, but the above mentioned writers indicate that there is no upward area limit to this sovereignty. They are highly critical of the United States concerning an incident in 1956 with regard to some balloons supposedly released by the United States and seized in the Soviet Union. Kislov and Krylov stated that, contrary to the late Secretary of State John Foster Dulles's remarks that there was no international code regulating airspace at approximately 97,000 feet where the balloons ascended, the ceiling question of sovereign right had long been settled by international law. In this regard they did not express a direct opinion as to the limitation or nonlimitation of sovereignty but cited both French and English authorities for the proposition that complete and exclusive sovereignty over airspace means without limit as to altitude.[53] Thus in evaluating the discussion presented by these two authorities it would seem they are proposing that exclusive sovereignty over airspace extends to infinity.

The other above-mentioned Russian, E. Korovin, approaches the problem of national sovereignty in space by first setting up certain limitations. He declares that the terms "cosmic," "interplanetary," "inter-stellar," "outer space," or "upper atmosphere" all relate to space beyond atmospheric limits. Secondly, he states that the basic question is "whether space beyond atmospheric limits comes within the jurisdiction of those countries over which this space is located, just as today a country exercises 'complete and exclusive sovereignty' over the airspace lying above its territory." [54]

In making his evaluation of the problem, Korovin contends that the Paris and Chicago conventions have nothing to do with space and that in reality a conclusion based on these proceedings could extend sovereignty to infinity. He further disregards national legislation as it refers to airspace and aircraft and not to space. In this regard he logically submits that if national sovereignty is extended into space, the protesting of satellite violations thereof might hinder the entire program of scientific space explorations.

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[52] Reprinted in S. Doc. No. 26, at 1037.
[53] *Id.* at 1045.
[54] Korovin, *International Status of Cosmic Space*, reprinted in S. Doc. No. 26, at 1062.

In concluding his evaluation of the present status of space, Korovin submits that the general opinion of the noted authorities is that national sovereignty cannot extend into space and subjacent states cannot control it through legislation.

Thus it appears that this Soviet authority does distinguish between airspace and space, but refuses to submit a line of designation. He further contends that national sovereignty does not extend into space and that space is free, that it "is the right of each country to use cosmic space as it sees fit without doing harm or causing injury to other states." [55]

Outside the Soviet Union but still within the sphere of Communist influence, Dr. Michael Milde of Charles University, Prague, Czechoslovakia, has rendered some interesting comments upon the development of astronautical jurisprudence. His article entitled, "Considerations on Legal Problems of Space Above National Territory," [56] which appeared in the *Review of Contemporary Law*, makes a positive approach to the problem and advocates specific theories.

Dr. Milde contends that there is no limit to national sovereignty in space and reaches the following conclusions:

> (a) The law of nations sets no altitude limit to territorial sovereignty over space; in theory this sovereignty applies *usque ad infinitum*.
>
> (b) For the purpose of an international convention dealing with the legal position of space, the following formula covering the field of sovereignty over space may be suggested: 'Every state enjoys complete and exclusive sovereignty over the space above its territory to the altitude where, within the range of technical possibility, any shape or form of human activity, or activity directed by man, is possible at any time.' [57]

In support of his position he, as did Kislov and Krylov, cites the meteorlogical balloon incident of 1956 as an invasion of state sovereignty when these balloons floated over some of the Communist bloc nations at a height of approximately 97,000 feet and generated protests therefrom. He cites this example as proof that states have a right to defend their sovereign status at altitudes where aircraft can only occasionally reach.

He further argues that the terminology used in the Paris and Chicago conventions is not applicable to space. In this regard a distinction is made between space activities and aviation, claiming that conventions regulating the latter cannot be a basis for limiting sovereignty.

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[55] *Id.* at 1070.
[56] Reprinted in S. Doc. No. 26, at 1102.
[57] *Id.* at 1107.

Dr. Milde submits that contemporary international law gives complete and exclusive sovereignty to the subjacent state without reservation as to altitude. He challenges Dr. C. Wilfred Jenks' theory that the universe is in constant motion and thus not subject to the sovereignty of a subjacent state, by stating:

> [W]hat is essential is that the limits of the sovereign powers of the State over space are constant, and can be recognized. This sovereignty consists of the vertical projection of the territorial frontiers of the State, a projection effected from the surface of the earth into cosmic space. The sector thus established is real property, and can always be recognized, though its concrete content may change.[58]

His last concept deals with the possibility of effective implementation of sovereign rights in space. He denounces the need for effective conquest, occupation and defense, but advocates a theory whereby sovereignty can be effected at any altitude where a state has the legal possibility of proving its control or where any form of human activity is possible.

This argument is of course entirely theoretical and so broad in its scope that it is impractical. To say the least this is a most nebulous line of reasoning. Dr. Milde also contends that there is no possibility of drawing a line such as the Karman Primary Jurisdictional Line because of the variance between the earth and the sun and moon. However, it is here submitted that this is a far more concrete line of demarcation and capable of physical determination than anything expressed in his theory of exercising sovereignty in space.

Therefore, under Dr. Milde's line of reasoning, each subjacent state on the surface of the earth can lodge a protest against the invasion of its sovereignty by artificial satellites or other space vehicles, regardless of the altitude. And further, each subjacent state can take whatever measures it so desires to protect its interest and national security from such invasion.

IV. LAW OF THE SEA

> Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all; and no one can vindicate to himself a superior or exclusive prerogative there. Every ship sails there with the unquestionable right of pursuing her own lawful business without interruption; but, whatever may be that business, she is bound to pursue it in such a manner as not to violate the rights of others.[59]

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[58] *Id.* at 1106.

[59] Mr. Justice Story in The Marianna Flora, 24 U.S. (11 Wheat.) 1, 42 (1826).

Mr. Justice Story, in the above quotation, has rather adequately expressed the doctrine of the freedom of the seas as we know it today. However, it seems as though the seas and the airspace above are not quite as free today as the doctrine indicates and years ago the entire situation was reversed.

During the early days of the new world exploration, nations claimed sovereignty over vast ocean areas. Spain, for example, claimed the Pacific Ocean and the Gulf of Mexico while Portugal claimed the Indian Ocean was under its sovereignty.

In 1609 a Dutch jurist named Hugo Grotius advocated in his "Mare Liberum" that is was impossible for any nation to monopolize the high seas because of the physical impossibility and that all nations had a common interest in using them.[60] This was the first breakthrough in an effort to establish the doctrine of freedom of the seas. England soon took up the cause and, where it concerned international problems, she advocated destroying sovereign claims over the oceans, maintaining that they were freely accessible to all nations.

This doctrine has developed through the years and has become an accepted principle of international law. In addition, court decisions, custom, treaties, and international conventions have recognized the doctrine. Also, certain rules have been developed to regulate usuage of the high seas. The regulations include subjects such as slave trade, fishing, underwater cables and collisions.

Dr. Welf Heinrich in his thesis entitled, "Air Law and Space," [61] expounded the concepts of the freedom of the seas doctrine rather well as follows:

> The principle of the freedom of the sea, established by international law, excludes the dominion of any nation over the sea. Any original or derived acquisition of territorial authority over parts of the high seas is impossible under international law. The sea in this respect is not 'res nullius,' but 'res communis.' Every state has the right in peacetime and as a rule, also in times of war to have its merchantmen and men-of-war sail the high seas under its own flag and under the exclusive rule of its own laws, and to appropriate to its own use, through the labor of its fishermen, the inexhaustible wealth offered by the depths of the sea.[62]

As stated previously the seas are not as free as the doctrine indicates and this is because of the unique area known as territorial waters. Hence we have a distinction between territorial seas as opposed to high seas to which the doctrine actually applies. Originally the concept of territorial waters related to sov-

[60] See Jessup and Taubenfeld, *op. cit. supra* note 49, at 210.
[61] Reprinted in S. Doc. No. 26, at 271.
[62] *Id.* at 297.

ereignty over a narrow band of coastal water one marine league—or three nautical miles—wide. This three-mile limit is widely recognized in international law, subject to the right of innocent passage for foreign ships wishing to use the waters as a thoroughfare. The 1958 Geneva Conference on Maritime Law drafted a convention on the subject of territorial seas and contiguous zones.[63] In this document it is stated that the ships, merchant as well as ships of war, of all states have the right of innocent passage through the territorial seas, provided such passage is in fact innocent. The conference stated, "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal states." [64]

The Convention on Territorial Sea and Contiguous Zone recognized two different methods to determine the base line from which the territorial sea is measured and, further, acknowledged the rule of customary international law that the coastal state could exercise limited jurisdiction in an area contiguous to its territorial waters. This area was not to exceed beyond 12 miles from the base line and was to be for the following purposes:

(1) prevent infringement of its customs, fiscal, immigration and sanitary regulations within its territory or territorial sea, and

(2) punish infringement of any of these regulations committed within its territory or territorial sea.[65]

The Soviet Union has laid sovereign claim to the area within the 12 mile limit while the United States has merely adhered to the above stated rule.[66] However, it would seem that the airspace above the 12 mile area would fall within the definition of airspace over which the United States has exclusive national sovereignty under the Federal Aviation Act of 1958.[67] (See Appendix B, *infra.*) To further complicate the situation, this nation and Canada have established air defense identification zones. The establishment of these zones in 1950, based on national security, extends a limited element of sovereignty in airspace beyond 12 miles from the shoreline as foreign aircraft are required to report their presence and identification when not less than one hour nor more than two hours average cruising distance from the continental United States.[68] Although it is an accepted principle of interna-

[63] Convention on Territorial Sea and Contiguous Zone, April 27, 1958, UN Doc. No. A/Conf. 13/L.52 (1958).

[64] See Hearn, *The Law of the Sea—The 1958 Geneva Conference*, JAG J., March–April 1960, p. 3–5.

[65] *Id.* at p. 6.

[66] See Ricketts and Beck, *Freedom of the Seas, The Territorial Sea, and the Doctrine of the Continental Shelf*, JAG J., June 1956, p. 3.

[67] 72 Stat. 731 (1958), 49 U.S.C. §§ 1301–1542 (1958).

[68] See Cooper, *Space Above the Seas*, JAG J., February 1959, p. 8.

tional law that space over the high seas is not subject to national sovereignty, it appears that the United States has projected its sovereignty beyond the 12 mile limit as far as airspace is concerned and this, of course, again reflects some doubt as to the doctrine of freedom of the high seas.

The analogy between astronautical law and the law of the sea is at first glance very apparent. The land areas mark the first points of departure and the next areas have similar aspects. Airspace, that area over which the subjacent state has exclusive sovereignty, can be easily related to the concept of territorial waters extending three miles beyond the shoreline. Most authorities in the field of astronautical law have visualized a relatively narrow vertical cone known as airspace above each subjacent state extending to a determinable point as the limit of national sovereignty. In this regard the analogy is very logical as both areas, even though subject to different definitions, are extremely similar.

The second area known as the contiguous zone has been subjected by international law to the exercise of limited jurisdiction by the coastal state. Professor Cooper has utilized this terminology in his proposal discussed previously. The contiguous zone in astronautical law would be that area above airspace and below outer space which could be used for the free passage of all nonmilitary flight instrumentalities.[69] Although the limits of this zone are not well defined by its advocates, the definition thereof indicates that limited jurisdiction could be exercised therein by the subjacent state, thus drawing the analogy to the similar zone in the law of the sea.

The third area, space and outer space, has been likened to the high seas. Here the doctrine of freedom of the seas finds its most proper application. Regardless of the final limits placed on airspace or contiguous space by international agreement or other means, the vast areas of space and outer space are much like the high seas. They, like the vast oceans, are physically incapable of being subjected to national sovereignty.[70] To argue otherwise would be to concede that Wake Island could lay claim to the Pacific Ocean and Monaco could claim its own infinite cone of space.

While the analogy between the law of the sea and astronautical law has its merit, the matter cannot be carried too far or an illogical conclusion will result. For example, if there is an accident on the high seas there is little chance of it having much effect on the

[69] See Cooper, *supra* note 3, at 320.

[70] See Ward, *Projecting the Law of the Sea Into the Law of Space*, JAG J., March 1957, p. 3.

shore. However, if a space ship or missile falls from space and crashes into the earth, it could have a very destructive consequence to life and property. Secondly, the area of national security differs materially when applied to the high seas as opposed to space. The oceans only touch a small portion of the coastal nations and the territorial waters and contiguous zone afford an area of defense. On the other hand, airspace and space cover the entire area of the subjacent state. Further, in this day and time, an airborne attack is much more likely than a seaborne attack; therefore, the law of the sea analogy does not present the entire scope of the problem.

Thus while the law of the sea analogy is given a great deal of consideration in formulation of theories for the law of space it is here submitted that this analogy should be limited to its physical characteristics and that the law of the sea, while a valid basis for comparison, should not be arbitarily adopted as astronautical law. The law of the sea has developed after a long course of international conduct, treaties and agreements; astronautical law should be allowed to develop in its own right.

V. TERRESTRIAL CLAIMS TO CELESTIAL BODIES

> National vested interests have not yet been developed in space or in celestial bodies. Barriers to agreement are now lower than they will ever be again.
>
> We must not lose the chance we still have to control the future of outer space.
>
> I propose that:
>
> 1. We agree that celestial bodies are not subject to national appropriation by any claims of sovereignty.[71]

On September 14, 1959, the Soviet Union announced that their lunar rocket Lunik II had hit the surface of the moon. As this was the first object sent from earth to another celestial body, the Soviets placed therein several medallions with the Soviet coat-of-arms on the surface and a Russian ensign.[72]

Alexsander V. Topchiyev, Deputy Chairman of the Soviet Academy of Sciences, stated that the depositing of these items on the moon did not constitute a territorial claim.[73] Two days later, Premier Krushchev stated on the same subject:

> We regard the sending of a rocket into outer space and the delivery of our pennant to the Moon as our achievement. And by this word 'our' we

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[71] Address by President Eisenhower, U.N. General Assembly, Sept. 22, 1960, reprinted in S. Doc. No. 26, at 1009.

[72]. See S. Doc. No. 26, at 626.

[73] *Id.* at 627.

mean the countries of the entire world, i.e., we mean that this is also your achievement and the accomplishment of all people living on Earth.[74]

On October 4, 1959, the Russians successfully launched Lunik III which made photos of the previously unseen far side of the moon. Upon publication of these photographs the Russians exercised the preogative of ancient discoveries by giving Russian names to the major features of the moon. Although the Russians have thus far declined to assert any claims of national sovereignty over the moon they are surely fortifying their position for future claims.

The present day test which a nation must meet to effect its sovereign rights over previously unclaimed territory is based on the evolution of international law. Two of the most recent cases in point are the Berlin Conference of 1885 and the decision of the International Court of Justice in 1933 concerning the island of Greenland.[75]

The Berlin Conference which dealt with Africa required the occupying power to give notice of its intention to take over a territory, to occupy the territory, and to set up a local government capable of maintaining order.[76] The Greenland case gave consideration to the inaccessible character of the island and upheld Denmark's claim based on (1) that nation's intention to act as sovereign and (2) its actual exercise or display of such authority, which had been previously unchallenged by other nations.[77]

Thus it appears that a Soviet claim to the moon at this time would be premature, so it is not too late to adopt a logical solution to this problem of the near future. There can be no doubt that a number of celestial bodies will eventually be reached by earth launched vehicles and subject to appropriation or control by individual nations. Therefore, four theories concerning this subject are submitted for evaluation.[78]

The first theory would be to divide the moon among those nations signifying a desire and ability to explore and or colonize their share. As the United States and the Soviet Union are the present major aerospace powers this theory would not be unlike "The Papal Line of Demarcation" made by Pope Alexander VI in 1493 to divide the New World between Portugal and Spain.

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[74] *Id.* at 1074.

[75] Legal Status of Eastern Greenland, P.C.I.J., ser. A/B, No. 53 (1933).

[76] See S. Doc. No. 26, at 633; Revision of the General Act of Berlin of February 26, 1885, and the General Act and Declaration of Brussels of July 2, 1890, September 10, 1919, 49 Stat. 3027, T.S. No. 877 (effective October 29, 1934, with reservation).

[77] See S. Doc. No. 26, at 634.

[78] See Cox and Stoiko, *op. cit. supra* note 21, at 171.

The second theory would be to consider the moon as any unclaimed surface on the earth; thereby, requiring the claiming nation to comply with the rules of international law discussed previously. This theory would advocate a first come, first serve basis only if there was evidence of peaceful and continuous display of national authority over the claimed area.[79] The third theory would be to recognize claims to wide corridors made as space ships orbit the moon. This theory does not acknowledge the concepts of international law reflected above and would create disputes where the corridors overlap. Further it would be most illogical both in theory and practice.

The fourth theory would place the moon under the control of the United Nations. Under such a theory the entire body would be held in trust by the United Nations for all the people of the earth. This, of course, means that the United Nations would also develop laws, rules and regulations to govern activities on the moon.

In evaluating these four theories it would seem that the second theory would be the most natural to adopt, considering the past history of the world on this subject. However, it would be most logical to consider the moon as incapable of appropriation in whole or in part. Therefore, by international agreement the nations most interested in moon exploration could decide its future and designate a program of international cooperation for constructive peaceful uses.

VI. UNITED NATIONS AND OUTER SPACE

> It would be my hope that the General Assembly, as a result of its consideration, would find a way to an agreement on a basic rule that outer space, and the celestial bodies therein, are not considered as capable of appropriation by any state, and that it would further affirm the over riding interest of the community of nations in the peaceful and beneficial use of outer space and initiate steps for an international machinery to further this end.[80]

The subject of national sovereignty in space first came before the United Nations in late 1957 and early 1958 as part of the general topic of "The Peaceful Use of Outer Space." Both the United States and the Soviet Union had proposed separate agenda items concerning this topic; however, the General Assembly com-

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[79] See Yeager, *The Politico—Legal Needs of Space Exploration*, 47 A.B.A.J. 275 (1961).

[80] Address by Secretary-General Dag Hammarskjold, *The United Nations and Outer Space*, The U. S. Governors' Conference, May 19, 1958, reprinted in S. Doc. No. 26, at 263.

bined them and referred the entire subject to a committee for consideration. During this period the United States, in association with 19 other nations, requested that the General Assembly appoint an *ad hoc* committee on the peaceful uses of outer space. The Soviet Union also revised their above-mentioned proposal. The General Assembly, by a vote of 54 to 9 with 18 abstentions, adopted the revised 20 nation proposal, and the Ad Hoc Committee was established.[81] (See Appendix E, *infra.*)

This committee was composed of Argentina, Australia, Belgium, Brazil, Canada, Czechoslovakia, France, India, Iran, Italy, Japan, Mexico, Poland, Sweden, the Soviet Union, the United Arab Republic, the United Kingdom, and the United States.[82] However, the Soviet Union, Poland and Czechoslovakia refused to be a part of the endeavor; thus the report of the committee was without the benefit or hinderance of the Communist nations. Further, India and the United Arab Republic also withdrew on the basis of desiring not to become involved in the cold war conflict.

The Ad Hoc Committee, which was a study and research group, formed a technical and a legal committee. The Legal Committee limited the scope of its study and report to "The nature of legal problems which may arise in the carrying out of programmes to explore outer space." [83]

In approaching this complex problem of space exploration the Legal Committee set up a three point program as follows: (1) to select and define the problems that have arisen or may arise in the near future, (2) to divide these problems into two groups based on their amenability to early solution, and (3) to submit without definite recommendations how the problems might be solved.[84] The committee then began their work with the aid of research papers and drafts submitted by the United States and Mexico.[85]

The general observations section of the Legal Committee report is most interesting. The committee evaluated the position of the United Nations and the International Court of Justice with regard to space and stated as a matter of principle these two organizations were not limited to the earth in their scope of operation. The committee cited Paragraph 1 of Article 2 of the United Nations Charter which recognized the sovereign equality of all its members as a basis for recommending the United Nations as the body under

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[81] See Jessup and Taubenfeld, *op. cit. supra* note 49, at 256.
[82] U.N. Doc. No. A/C.1/L.220/Rev. 1 (1958).
[83] U.N. Doc. No. A/AC.98/2 (1959).
[84] *Ibid.*
[85] U.N. Docs. Nos. A/AC.98/L.7 and L.8 (1959).

whose auspices international cooperation for peaceful space programs could best be taken.

Further, the committee recognized that space was, in fact, a separate area but that certain analogies between the law governing activities in airspace as well as the ocean could be utilized to help develop a law for space. However, because of the fact that so little is known about the potential of space activities, the committee felt that a comprehensive code was not practicable, nor desireable at this time.

On the subject of "Freedom of Outer Space For Exploration and Use," the committee was of the opinion that unprotested space vehicle launchings during the International Geophysical Year established a precedent. Because of this the nations of the world established a general rule to the effect that "in principle, outer space is, on conditions of equality, freely available for exploration and use by all in accordance with existing or future international law or agreements."[86]

The Legal Committee also considered the complex problem of determining where outer space begins. They recognized that each nation has exclusive sovereignty in the airspace above its territory but that as yet the upper limits thereof are not defined. The committee suggested, among other solutions, that an international agreement based on present knowledge and experience, although premature, could answer the basic questions. Another possible solution suggested by the committee was that a tentative boundary between space and airspace be established high enough so as not to interfere with existing aviation activities and low enough so as not to restrict space activities. This was in effect an acknowledgement of the Karman Primary Jurisdictional Line discussed previously.

The entire Ad Hoc Committee report was submitted to the United Nations General Assembly in June 1959. Although the Legal Committee report was very cautious and carefully worded it does lay the foundations for the United Nations to become the potential governing body and source of jurisdiction for space activities.

There are a number of well known authorities in the field advocating that the United Nations take active control of all activities in space. Sir Leslie K. Munro, president of the 12th session of the United Nations General Assembly, is one of the foremost ad-

[86] U.N. Doc. No. A/AC.98/2, at p. 4 (1959).

vocates of United Nations' leadership in the field of space activities. He contends that (1) the United Nations is properly equipped to provide the small powers with an opportunity to be heard, (2) that the principles and purposes of the United Nations lend it to the international consideration of such problems, and (3) that the United Nations is the proper forum to encourage the sharing of scientific achievements.[87]

In addition to Sir Leslie K. Munro, Donald Cox and Michael Stoiko have advocated a comprehensive space code under United Nations sponsorship and the establishment of a UN agency to enforce peace in space.[88] These two gentlemen argue that the time has arrived for the establishment of international space laws to ensure the security of the world. They also argue that precedent for the establishment of a United Nations space force was the international police force which functioned during the Egyptian-Israeli dispute over the Gaza Strip.

Thus the proposition that the United Nations is the most likely organization to assume jurisdiction over space activities is well fortified with precedent and solid argument. The United Nations Legal Committee of the Ad Hoc Committee on the Peaceful Uses of Outer Space claims the United Nations Charter, as a matter of principle, projects that organization into space activities. Sir Leslie K. Munro agrees, while the others mentioned above advocate United Nations control as a present day necessity and include in their proposal a space force to keep the peace.

The arguments in favor of United Nations leadership in space activities certainly have merit, and it would be a great achievement if the members thereof could unanimously agree that the United Nations is the appropriate organization for such a task. However, the past record does not indicate that such an achievement is possible so long as the Communist bloc maintains their uncooperative attitude. For example the Ad Hoc Committee was not supported by the Communist membership and their voluntary withdrawal was a factor in the withdrawal of India and the United Arab Republic. The history of the United Nations has been one of a constant struggle between the Soviet bloc and the nations of the West, and the former have seldom agreed to any cooperative venture which was not totally beneficial to the furtherance of communism. Thus it is doubtful if any workable course of action in the area of space activity could be agreed upon.

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[87] Munro, *The Nations and The Firmament*, JAG J., February 1959, p. 14.
[88] Cox and Stoiko, *op. cit. supra* note 21, at 197, 203.

Sir Leslie K. Munro, in advocating United Nations control of outer space, stated that the United Nations was the appropriate organization because the small powers had a right to be heard. This of course raises the issue of whether or not the small powers have a right to be heard on a subject in which they have no potential actual active participation. When England, France and Spain were dividing the new world they certainly didn't consult the various principalities of Germany or Italy. Therefore, by the same analogy why should the Soviet Union and the United States and the other one or two potential space exploring nations consult with Haiti or Thailand concerning space activities? Surely all the nations of the world should have some voice in what takes place in the "airspace over which they have sovereignty" and also in subjects such as the allocation of radio frequencies, and liability for injury or damage caused by space vehicles, but not concerning exploration of celestial bodies or space research and travel.

The theory of a United Nations Space Force proposed by Cox and Stoiko is most unrealistic. All the vehicles would, of necessity, be provided by the nations who are engaged in the venture and the space force personnel would have to be trained by the same nation. It is rather inconceivable that (1) there will be sufficient activity in space for several years to warrant such a force and (2) that the two or three nations engaged in such activities would be willing to suffer the expense of creating a United Nations Space Force when they could affect the same result by mutual agreement.

Thus the entire potential of the United Nations concerning space activity is based on mutual cooperation between the member nations and particularly the Soviet Union and the United States. A possible solution to the dilemma would be for each nation in the world to convey by treaty to the United Nations as a body all their national rights and interests above a specific altitude, such as is determinable by the Karman Primary Jurisdiction Line. Such an agreement, properly submitted, might gain Soviet approval and would be a solid foundation for the United Nations to begin to exercise authority over the various problem areas pointed out by the Ad Hoc Committee referred to above. Until such a treaty is finalized or the United Nations members themselves can find a position of mutual agreement, the accomplishments of the United Nations Organization in outer space will be negligible.

The United Nations is not the only international organization that has received support as the body to formulate guidelines in space. Senator Kenneth B. Keating of New York has taken the position that either the International Civil Aviation Organization

or the International Astronautical Federation is better suited for such a task.[89]

The International Civil Aviation Organization is limited by its own general purposes to consider problems involving the use of airspace, the development of standards, practices, and procedures for flight, and to insure the safe and orderly growth of civil aviation.[90] Further, the decisions of this nongovernmental organization are not fully binding. Thus not only would its scope need to be broadened to include areas beyond airspace, but the organization would need authority to force compliance with its directives.

The International Astronautical Federation is composed of approximately thirty-eight scientific and astronautical associations representing thirty nations.[91] This is an international nongovernmental organization which is not associated with the United Nations and like the International Civil Aviation Organization has limited authority. The main purpose of the organization is to encourage space activity by research and scientific advancement dedicated to the peaceful uses of outer space.

The International Astronautical Federation includes the International Institute of Space Law, which, according to its constitution, may conduct research on the judicial and sociological aspects of space projects.[92] This then is a rather unique combination of both the scientific and legal approach to the problem generated by man's venture into space.

Considering the fact that the International Astronautical Federation is equipped to deal with the scientific as well as the legal problem presented by activities in space, Senator Keating certainly has a suggestion of merit. If both the Soviet Union and the United States were to encourage the International Astronautical Federation to make comprehensive studies in the various problem areas and support the project, this could well be the organization to formulate the basic concepts in science, law and sociology to help solve the problems of space.

In addition to the United Nations or some other nongovernmental organization becoming the ruling body over space activities or the agency to formulate the basic rules to govern space activity, there is the tremendous area of international negotia-

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[89] Keating, *Reaching for the Stars: Space Law and the New Fourth Dimension*, 45 A.B.A.J. 54 (1959).
[90] See Jessup and Taubenfeld, *op. cit. supra* note 49, at 87–88.
[91] See S. Doc. No. 26, at 1276.
[92] *Id.* at 1286*b*.

tions which could be the basis for solving the various problems. At the present time there are only two nations undertaking space exploration, the Soviet Union and the United States. It is doubtful if this group will be enlarged for many years, as the cost is prohibitive and the scientific and technical ability available is rather limited. Therefore, perhaps this is the time for the Soviet Union and the United States to enter into an international agreement concerning space activities. Such an agreement could cover a multitude of subjects, and, if adhered to by the parties thereto, it would eventually become accepted as the basis for regulating space activities and as a part of international law. Furthermore, such a treaty could be adopted by the United Nations as a guide line for their participation, if any, in the actual or theoretical exploration of space.

The United States has on many occasions advocated that space be dedicated to peaceful uses.[93] On January 12, 1958, President Eisenhower sent a letter to Soviet Premier Bulganin proposing (1) that space be dedicated to peaceful uses and denied for purposes of war and (2) expressing the willingness to meet the Soviet leaders to discuss this subject.[94] Premier Bulganin's reply contained a proposal to include the consideration of a wide variety of subjects unrelated to the peaceful use of outer space. This letter was the basis for the Soviet proposal made before the United Nations on March 15, 1958, which included (1) prohibiting the use of space for military purposes, and requiring states launching missiles into space to do so in accordance with an agreed international program, (2) the liquidation of foreign military bases on the territory of other states, (3) the establishment of a United Nations agency to control and implement proposals one and two and (4) the creation of a United Nations agency for international cooperation in space research.[95]

If the Soviets are sincere in their desire to prohibit the use of space for military purposes, then they should be willing to negotiate a treaty or consent to an international agreement to that effect. And the treaty or agreement could, as previously stated, cover a multitude of problems areas, from fixing the lower limits of national sovereignty to allocating radio frequencies. However, so long as the Soviets include unrelated topics in their proposals, there is little hope that the field of international negotiations can be utilized to help solve the problems.

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[93] *Id.* at 985*d*.
[94] *Id.* at 986.
[95] *Id.* at 994. See Appendix F, *infra*.

VII. PROPOSED SOLUTION

The basis for any proposed solution must be its acceptability by both the Soviet Union and the United States. The upper limits of airspace and thus national sovereignty, the organization that should control or regulate space activities, and various theories pertaining to both, have been previously discussed. There appears to be an agreement among a majority of the authorities that national sovereignty does not extend to infinity. Further, that in establishing limits to which national sovereignty does extend, the line so set must be capable of determination. This, of course, is a very difficult task as there are no visible physical bounderies in the atmosphere. Thus it is submitted that the line must be capable of identification through reaction.

The Karman Primary Jurisdictional Line proposed by Andrew G. Haley (see Section III, *supra*) is susceptible to determination because of aerodynamic reactions and is here proposed as the line of demarcation between airspace and space (see Appendix A, *infra*). Although this line may vary it is generally considered to begin somewhere above 52 miles. Further, in considering this line as the proper point of departure, the lowest altitude at which a satellite may remain in orbit must also be considered. It has been resolved that this altitude in not in excess of 70 miles above the earth's surface. (See Section III, *supra.*)

Therefore, in the final analysis, it is here proposed that the Karman Primary Jurisdiction Line be accepted as the upper limit of airspace and the lower limit of space. And further, that for purposes of determination, the line be acknowledged as a band ten miles wide (see Appendix A, *infra*), beginning at an altitude of 60 miles and ending at an altitude of 70 miles above the earth's surface. This may be more particularly defined as beginning at that point above the earth's surface where aerodynamic lift ceases and extending to that point where a satellite may pursue an orbit.

It is further proposed that to orderly implement this solution the United States and the Soviet Union enter into a treaty naming the Karman Primary Jurisdictional Line as the upper limit of state sovereignty and agree that all activities conducted above that line be for peaceful purposes. Furthermore, these two nations should grant to the International Astronautical Federation the task of formulating certain ground rules for conducting space activities. This project should include, but not be limited to, the following subjects: navigation, space rescue, liability for injury

caused by space vehicles, allocation of radio frequencies, identification and registration of space vehicles, flight planning, launching, re-entry and landing of space vehicles, and construction of space vehicles, space stations and bases.

The International Institute of Space Law of the International Astronautical Federation should, in conjunction with the latter organization, identify the various legal problems pertaining to the adoption of the Karman Primary Jurisdictional Line as well as others that will affect space activities. This is not to suggest a comprehensive space code, as such a venture would be rather premature at this time. As stated by Major General Albert M. Kuhfeld, Judge Advocate General of the Air Force:

> A body of Space or Astronautical Law will gradually unfold as law in the past has developed. Solutions arrived at will be premised on man's concepts of justice, as conditioned by his environment. This is perhaps just saying in another way—the natural law. The various rules of Law of the Sea and of Air Law will not arbitrarily be adopted as Astronautical Law. The reason for each such rule must be examined to determine whether it has application to the facts and needs of space developments.[96]

Upon completion of this project by the International Astronautical Federation and agreement to the specific proposals by the Soviet Union and the United States, they should be submitted to the United Nations for adoption. Also the two major space powers should, by treaty, transfer all their sovereign interests above airspace to the United Nations, thereby giving a basis for United Nations jurisdiction over all the universe and space activities conducted therein. The other nations of the world should follow this example, and in addition submit to the jurisdiction of the International Court of Justice as the judicial body to determine all legal matters pertaining to space and outer space.

In conclusion it is submitted that this process will establish space as an area for only peaceful operations and give to each subjacent state a sufficient height in airspace for security and national defense purposes. The area beyond airspace will then be controlled by the United Nations, based on the groundwork accomplished by the International Astronautical Federation. However, the entire proposal, as stated at the beginning of this section, depends on its acceptability by the Soviet Union and the United States. Without the agreement, cooperation and full support of these two nations neither this nor any other proposed solution will be workable.

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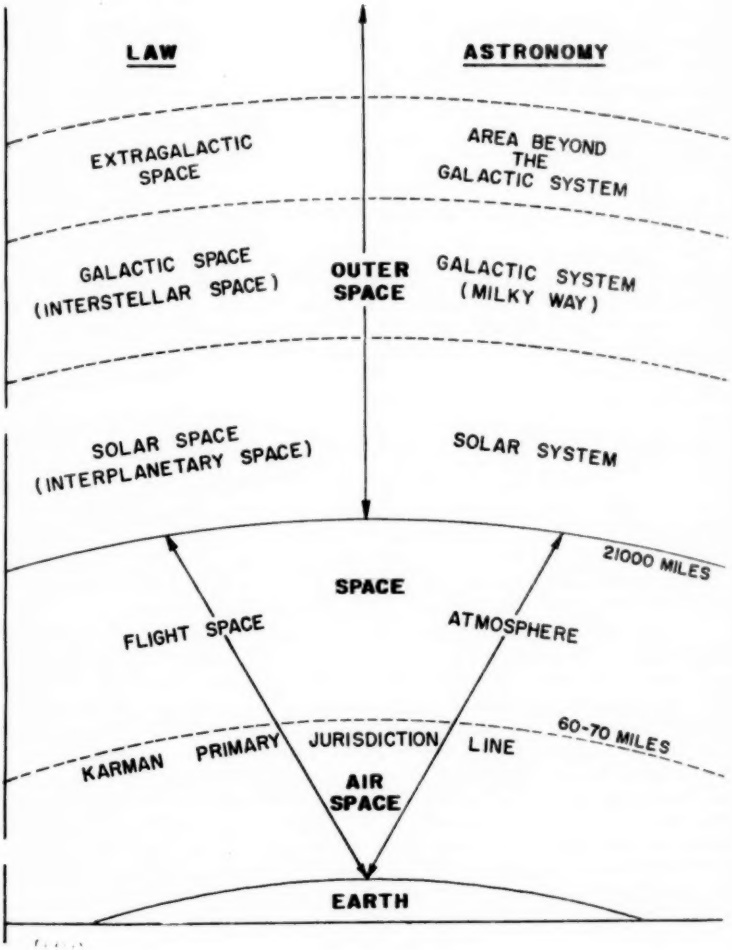
[96] Kuhfeld, *The Space Age Dilemma*, U.S. Air Force JAG Bull., January 1961, p. 3, 7.

VIII. APPENDICES

APPENDIX A



APPENDIX B

FEDERAL AVIATION ACT OF 1958
PUBLIC LAW 85–726; 72 STAT. 731

FOREIGN AIRCRAFT

SEC. 1108. (a) The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction. Aircraft of the armed forces of any foreign nation shall not be navigated in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State.

GEOGRAPHICAL EXTENSION OF JURISDICTION

SEC. 1110. Whenever the President determines that such action would be in the national interest, he may, to the extent, in the manner, and for such periods of time as he may consider necessary, extend the application of this Act to any areas of land or water outside of the United States and the overlying airspace thereof in which the Federal Government of the United States, under international treaty, agreement or other lawful arrangement has the necessary legal authority to take such action.

NATIONAL AERONAUTICS AND SPACE ACT OF 1958
PUBLIC LAW 85–568; 72 STAT. 426
DECLARATION OF POLICY AND PURPOSE

SEC. 102. (a) The Congress hereby declares that it is the policy of the United States that activities in space should be devoted to peaceful purposes for the benefit of all mankind.

(b) The Congress declares that the general welfare and security of the United States require that adequate provision be made for aeronautical and space activities. The Congress further declares that such activities shall be the responsibility of, and shall be directed by, a civilian agency exercising control over aeronautical and space activities sponsored by the United States, except that activities peculiar to or primarily associated with the development of weapons systems, military operations, or the defense of the United States (including the research and development necessary to make effective provision for the defense of the United States) shall be the responsibility of, and shall be directed by, the Department of Defense; and that determination as to which such agency has responsibility for and direction of any such activity shall be made by the President in conformity with section 201(e).

DEFINITIONS

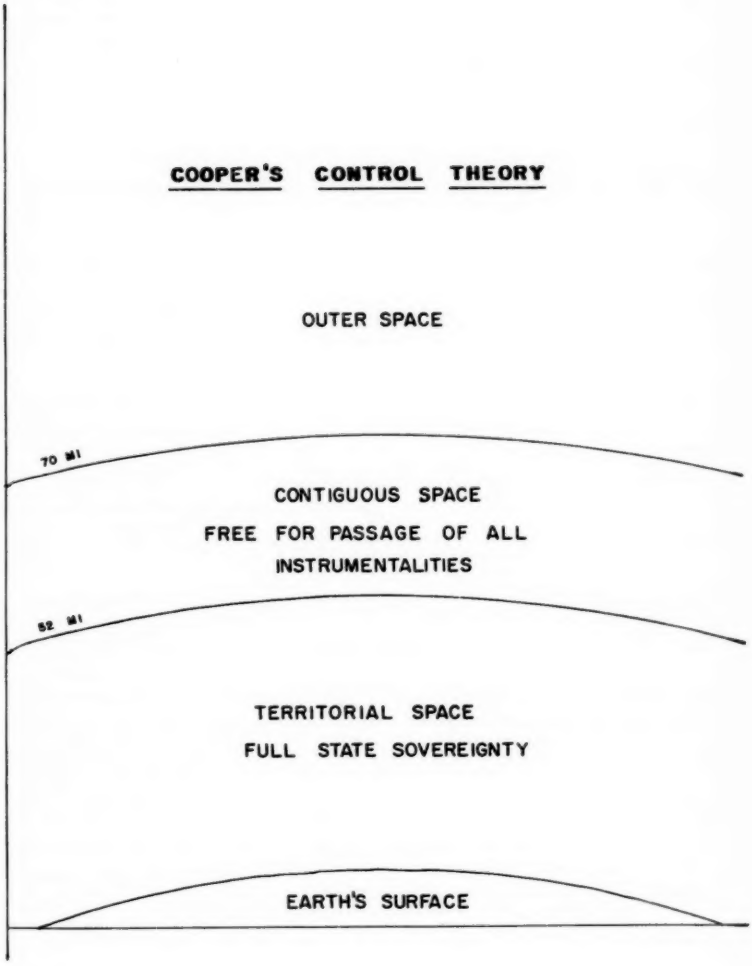
SEC. 103. As used in this Act—

(1) the term "aeronautical and space activities" means (A) research into, and the solution of, problems of flight within and outside the earth's

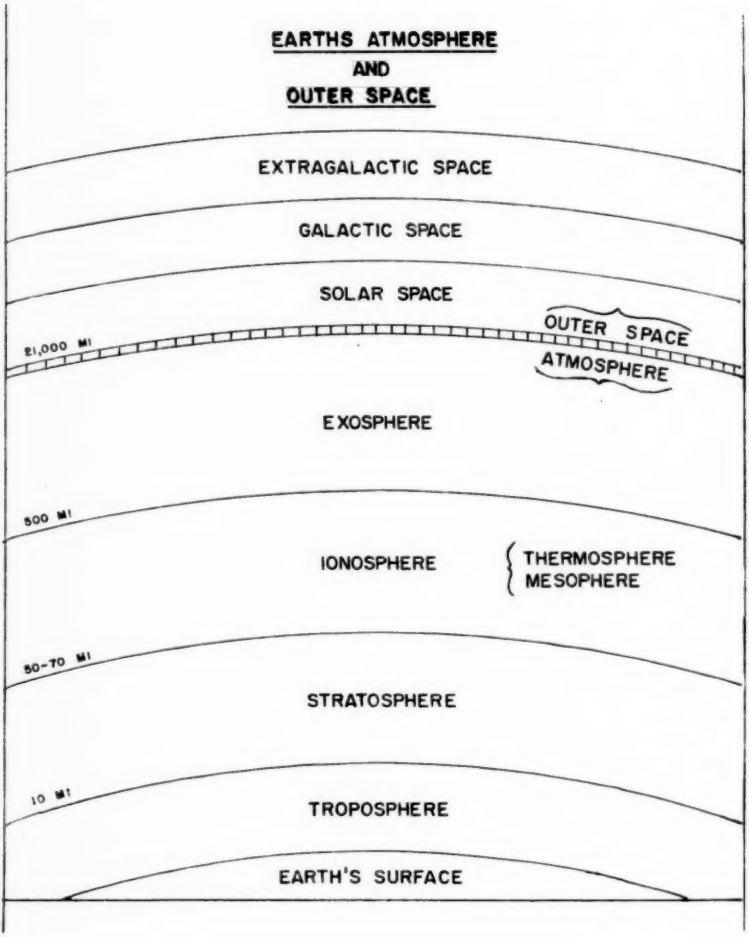
atmosphere, (B) the development, construction, testing, and operation for research purposes of aeronautical and space vehicles, and (C) such other activities as may be required for the exploration of space; and

(2) the term "aeronautical and space vehicles" means aircraft, missiles, satellites, and other space vehicles, manned and unmanned, together with related equipment, devices, components, and parts.

APPENDIX C



APPENDIX D


EARTHS ATMOSPHERE
AND
OUTER SPACE
EXTRAGALACTIC SPACE
GALACTIC SPACE
SOLAR SPACE
21,000 MI
OUTER SPACE
ATMOSPHERE
EXOSPHERE
500 MI
IONOSPHERE
THERMOSPHERE
MESOPHERE
50-70 MI
STRATOSPHERE
10 MI
TROPOSPHERE
EARTH'S SURFACE

APPENDIX E

THE THIRTEENTH GENERAL ASSEMBLY RESOLUTION ON THE PEACEFUL USE OF OUTER SPACE

The General Assembly,

RECOGNIZING the common interest of mankind in outer space and that it is the common aim that it should be used for peaceful purposes only,

BEARING IN MIND the provision of Article 2, paragraph 1, of the Charter, which states that "the Organization is based on the principle of the sovereign equality of all its Members,"

WISHING to avoid the extension of present national rivalries into this new field,

DESIRING to promote energetically the fullest exploration and exploitation of outer space for the benefit of mankind,

CONSCIOUS that recent developments in respect of outer space have added a new dimension to man's existence and opened new possibilities for the increase of his knowledge and the improvement of his life,

NOTING the success of the scientific cooperative program of the International Geophysical Year in the exploration of outer space and the decision to continue and expand this type of cooperation,

RECOGNIZING the great importance of international cooperation in the study and utilization of outer space for peaceful purposes,

CONSIDERING that such cooperation will promote mutual understanding and the strengthening of friendly relations among peoples,

BELIEVING that the development of programs of international and scientific cooperation in the peaceful uses of outer space should be vigorously pursued,

BELIEVING that progress in this field will materially help to achieve the aim that outer space should be used for peaceful purposes only,

CONSIDERING that an important contribution can be made by the establishment within the framework of the United Nations of an appropriate international body for cooperation in the study of outer space for peaceful purposes,

DESIRING to obtain the fullest information on the many problems relating to the peaceful uses of outer space before recommending specific programs of international cooperation in this field,

1. ESTABLISHES an *ad hoc* committee on the peaceful uses of outer space consisting of the representatives of Argentina, Australia, Belgium, Brazil, Canada, Czechoslovakia, France, India, Iran, Italy, Japan, Mexico, Poland, Sweden, the Union of Soviet Socialist Republics, the United Arab Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America, and requests it to report to the General Assembly at its fourteenth session on the following:

(a) The activities and resources of the United Nations, of its specialized agencies, and of other international bodies relating to the peaceful uses of outer space;

(b) The area of international cooperation and programs in the peaceful uses of outer space which could appropriately be undertaken under United Nations auspices to the benefit of States irrespective of the state of their economic or scientific development, taking into account the following proposals, among others:

(i) Continuation on a permanent basis of the outer space research now being carried on within the framework of the International Geophysical Year;

(ii) Organization of mutual exchange and dissemination of information on outer space research; and

(iii) Coordination of national research programs for the study of outer space, and the rendering of all possible assistance and help towards their realization;

(c) The future organizational arrangements to facilitate international cooperation in this field within the framework of the United Nations;

(d) The nature of legal problems which may arise in the carrying out of programs to explore outer space;

2. REQUESTS the Secretary-General to render appropriate assistance to the above-named committee and to recommend any other steps that might be taken within the existing United Nations framework to encourage the fullest international cooperation for the peaceful uses of outer space.

APPENDIX F

SOVIET PROPOSAL ON THE QUESTION OF BANNING OF THE USE OF COSMIC SPACE FOR MILITARY PURPOSES, THE ELIMINATION OF FOREIGN MILITARY BASES ON THE TERRITORIES OF OTHER COUNTRIES, AND INTERNATIONAL COOPERATION IN THE STUDY OF COSMIC SPACE, MARCH 15, 1958*

(EXTRACT)

* * * * * * *

In order to ensure the security interests of all States to the maximum degree, and also in the interests of developing international cooperation in cosmic-space research for peaceful purposes, the Soviet Government proposes the conclusion of a broad international agreement which would include the following basic provisions:

1. A ban on the use of cosmic space for military purposes and an undertaking by States to launch rockets into cosmic space only under an agreed international programme.

2. The elimination of foreign military bases on the territories of other States, primarily in Europe, the Near and Middle East and North Africa.

3. The establishment within the framework of the United Nations of appropriate international control over the implementation of the obligations set forth in paragraphs 1 and 2 above.

* Documents on Disarmament, 1945–1959, vol. II, pp. 976–977.

4. The establishment of a United Nations Agency for international cooperation in the study of cosmic space which could have the following functions:

To work out an agreed international programme for launching intercontinental and space rockets with the aim of studying cosmic space, and supervise the implementation of this programme;

To continue on a permanent basis the cosmic-space research now being carried on within the framework of the International Geophysical Year;

To serve as a world centre for the collection, mutual exchange and dissemination of information on cosmic research;

To coordinate national research programmes for the study of cosmic space and render assistance and help in every way towards their realization.

The Soviet Government proposes that this problem should be discussed at a conference with the participation of Heads of Government in order that agreement should be reached on it, at least in principle.

With a view to the working out of a general international agreement in which all States could participate, the Soviet Government has simultaneously submitted this question for consideration at the thirteenth session of the United Nations General Assembly.

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FINANCIAL CONTROL: CONGRESS AND THE EXECUTIVE BRANCH *

BY LAWRENCE E. CHERMAK**

I. FEDERAL EXPENDITURES

To meet the demands of national growth and the fulfillment of international obligations, federal expenditures have increased enormously. The Federal Government as a whole spent more money currently in the ten days between the holidays celebrating the birthdates of Lincoln and Washington than was spent for the period between these Presidents' administrations.[1] The current annual federal expenditures from all funds in the Treasury are greater than one hundred ten billion dollars,[2] which is approximately what the aggregate total federal expenditures were when Franklin D. Roosevelt took office.[3] In fact, the rate of expenditures in the current decade is much greater than the total money spent by the United States Government up to the Korean Conflict.[4]

* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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[1] The federal government spent $1,730,763,289 up to 1860. The average 10-day expenditure in the current fiscal year is in excess of two billion dollars. See 1960 Sec'y Treasury Ann. Rep., State of Finances, H. R. Doc. No. 3, 87th Cong., 1st Sess. (1961).

[2] The current annual rate of Federal expenditures from all funds in the Treasury is in excess of 110 billion dollars. This includes the 83 billion dollar rate in the General Fund, the 25 billion dollar rate in the Trust Funds and the approximately 9 billion dollar rate (not shown in General Fund) in the Public Enterprise Funds. The indicated rate is in excess of 115 billion dollars. See note 1 *supra;* The Budget of the United States Government for the Fiscal Year ending June 30, 1962, Tables on pp. 18, 979 and 982 (1961).

[3] The Federal Government had spent $108,389,796,120 through June 30, 1930. See note 2 *supra.*

[4] The total Federal expenditures out of the General Fund prior to June 30, 1950, was $699,151,971,592. At the end of June 30, 1960, this figure stood at $1,380,024,745,059. The expenditures out of Trust Funds and Public Enterprise Funds were many times greater in the past 10 years than occurred for the total period prior to June 30, 1950. For instance, no expenditures were made from the Highway Trust Fund prior to June 30, 1950, while more than 8 billion dollars were appropriated to this Fund up to June 30, 1960. Similarly, the Trust Fund expenditures in the current fiscal year for labor and welfare exceed 18 billion dollars, which is approximately equal to the total transfers made to the trust accounts prior to 1950. Trust Funds and Public Enterprise Funds have spent tens of billions of dollars more during the 1950–1960 period than was spent prior to June 30, 1950. See Tables 2 and 3 of Annual Report of the Secretary of the Treasury, note 1 *supra;* and Special Analysis A of The Budget of the United States, 1960, note 2 *supra.*

II. CONSTITUTIONAL REQUIREMENTS

No expenditure may be made by the Executive Branch of the Federal Government unless the Congress appropriates funds to make payments out of the Treasury. The Constitution has established legislative control of the purse by providing that, "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law."[5] The Executive Branch is limited by the appropriation in regard to the amount, purpose and period of availabilty of the money made available for obligation and expenditure. These are matters within the sole discretion of the Congress.[6] The exercise of this discretion may be expressed in an appropriation act[7] or in permanent statutes applicable to all appropriations.[8] To make an appropriation it is necessary that the Act of Congress declare the appropriation to be made in specific terms.[9] Furthermore, the funds appropriated may only be used for the objects for which the appropriation is made,[10] and no officer or employee of the Federal Government may obligate or expend in excess or in advance of such appropriations, unless the obligation or contract is authorized by law.[11]

III. BUDGET PROCESS

Even though the Congress has exclusive control over appropriations, the preparation of the federal budget is the sole responsibility of the Executive Branch. The budget process affords a vivid example of the operation of the division of power between the Executive Branch and the Congress. Once the President has developed his budget—consisting for fiscal year 1962 of over 1000 appropriations—and presented it to the Congress, the Congress has the responsibility of deciding how much money is to be appropriated for each of the executive agencies. For the fiscal year 1962, the Congress incorporated these appropriations into 14

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[5] U.S. Const. art. I, § 9, cl. 7.

[6] Spaulding v. Douglas Aircraft Co., 60 F.Supp. 985 (S.D. Cal. 1945).

[7] There were more than 1000 appropriations in 14 major appropriation acts for the fiscal year 1962. See list of acts in 171 Cong. Rec. 20233 (Pt. II) (1961).

[8] The basic statutes include 34 Stat. 764 (1906), 31 U.S.C. § 627 (1958); Rev. Stat. § 3678 (1875), 31 U.S.C. § 628 (1958); Rev. Stat. § 3679 (1875), as amended, 31 U.S.C. § 665(a) (1958); Rev. Stat. § 3617 (1875), 31 U.S.C. § 484 (1958); Rev. Stat. § 3618 (1875), as amended, 31 U.S.C. § 487 (1958). Title 31 of the United States Code contains most of the permanent legislation covering money and finance.

[9] 34 Stat. 764 (1906), 31 U.S.C. § 627 (1958).

[10] Rev. Stat. § 3678 (1875), 31 U.S.C. § 628 (1958).

[11] Rev. Stat. § 3679 (1875), as amended, 31 U.S.C. § 665(a) (1958); Rev. Stat. § 3732 (1875), 41 U.S.C. § 11 (1958).

major appropriation acts, after editing and sometimes revising the language of each appropriation contained in the budget document.

Appropriation bills by custom originate in the House of Representatives.[12] Full justifications are made before the sub-committees of the House Appropriations Committee. The Senate Appropriations Committee usually limits its hearings to appeals for increases by the various executive agencies over the House bill. The language of the appropriation is the test of the legality of the purpose for which the funds are appropriated. Budget estimates and related justifications are not controlling, unless they are incorporated either directly or by reference in the act making the appropriation.[13] When the appropriations have been made, the control of obligations and expenditures thereunder shifts back to the executive agencies, who have the responsibility of employing the appropriated funds in accordance to law[14] and subject to the general control exercised by the President through the Bureau of the Budget.[15] To assure uniformity in practice, a standard fiscal terminology for budget control has been prescribed by the Bureau of the Budget.[16] The shift of control to the Executive Branch does not prevent Congress from following the funds. Through the Budgeting and Accounting Act of 1921,[17] the General Accounting Office, established independent of the Executive Branch, was given authority to audit for the Congress the various appropriation accounts.

IV. OBLIGATION CONTROL

Although the Constitutional limitation is directed toward expenditures out of the Treasury, the Congress does not appropriate in terms of expenditure control but in terms of new obligational authority. The budget submitted by the President sets forth new appropriations as new obligational authority requested.[18] For the

[12] U. S. Const. art. I, § 7, cl. 1, provides for revenue bills to originate in the House of Representatives; whether this includes appropriations has not been resolved.

[13] 17 Comp. Gen. 147 (1937); 18 Comp. Gen. 533 (1938).

[14] 64 Stat. 765 (1950), 31 U.S.C. § 665(a)–(i) (1958), the so-called Anti-deficiency Act, establishing administrative controls on the use of funds.

[15] The Bureau of the Budget was created by section 207 of the Budget and Accounting Act of 1921, 42 Stat. 22, as amended, 31 U.S.C. § 16 (1958).

[16] See Part II of Bureau of the Budget Circular No. A–34 (July 1957).

[17] 42 Stat. 22, as amended, 31 U.S.C. § 16 (1958).

[18] See The Budget of the United States Government for the Fiscal Year ending June 30, 1963, p. 114, which states that "government agencies are permitted to incur obligations, requiring either the current or future payment of money, only when they have been granted appropriations or other authority to do so by law. The amounts thus authorized by Congress are

fiscal year 1962, the original budget submission of the President requested 80.9 billion dollars as new obligational authority and carried over into the current year 39.4 billion dollars from previous years. At the same time, the President stated that the budget expenditures against this total outstanding obligational authority of 120.3 billion dollars would be 80.9 billion dollars for fiscal year 1962. The Congress has made no provision in any of the current appropriation acts to limit the total expenditure for the current fiscal year to this or any other expenditure figure. Under the annual accrued expenditure legislation,[19] this may be done, but any effort to apply an expenditure limitation to an appropriation has been denied by the House Appropriations Committee.[20] As a result, the burden of balancing the budget—keeping budget expenditures of a fiscal year within the budget revenues of such fiscal year—continues to rest with the President.

V. COMMITTEE RESPONSIBILITY

Under House Rule XXI substantive legislation must originate in standing committees other than the Appropriations Committee. Conversely, all appropriations must originate with the Appropriations Committee and cannot include any purposes which have not been previously authorized by law.[21] No appropriation bill may be reported by any committee not having jurisdiction to report appropriations.[22] The first aspect of this rule was originally adopted in 1837 in order to prevent delay in consideration of appropriation bills on the floor of the House where the underlying legislative grant of power to the Executive Branch found in substantive legislation had not previously been considered.[23] Where it becomes possible to grant authority to obligate through other means than appropriations as subsequently discussed, then a proper distribution of legislative responsibility which separates substantive legislation from grants of power to obligate and expend is not maintained among the standing committees. The jurisdiction to report appropriations should be complete and

called new obligational authority (NOA). Such authority must be related to the obligations expected to be incurred, rather than match the expenditures which are expected to be made during any fiscal year."

[19] 72 Stat. 852 (1958), 31 U.S.C. § 11(b)–(f) (1958).

[20] See S. Doc. No. 11, 87th Cong., 1st Sess. 99 (1961). This document is entitled "Financial Management in the Federal Government" and is a comprehensive analysis of existing and proposed Federal fiscal legislation. For further discussion, see Chermak, *Annual Accrued Expenditures*, 3 Armed Services Comptroller No. 2 (June 1958).

[21] House Rule XXI, cl. 2, in Rules and Manual, U. S. House of Representatives, H.R. Doc. No. 122, 86th Cong., 1st Sess. (1959).

[22] House Rule XXI, cl. 4, in H.R. Doc. No. 122, *supra* note 21.

[23] *Ibid.*

should embrace all authority to obligate; for the creation of a contract making the federal government liable for payments thereunder, in effect, destroys the control of the Appropriations Committee over subsequent appropriations required for its liquidation.

VI. CONTRACT AUTHORITY

Obligation control becomes the basic consideration between the Congress and the Executive Branch. This not only means control of appropriations but also any other authority to obligate. Congress can pass legislation which merely grants authority to obligate by contract to an executive agency. At such time it is not necessary to appropriate funds to liquidate the obligation created. Only in a subsequent fiscal year when expenditures must be made to liquidate the obligation, is an appropriation required under the Constitution.[24]

VII. BACK-DOOR FINANCING

Contract authority is granted frequently. Mr. Cannon, Chairman of the House Appropriations Committee, has tabulated eleven legislative acts in which this occurred in the first session of the 87th Congress.[25] This compilation included all instances of public debt borrowing, use of receipts and extension of existing authority as well as contract authority. The Chairman was very critical of these methods of authorization to obligate and labeled them back-door financing. Such authority does not originate in the Appropriations Committee but is reported out by the standing committee having jurisdiction of the legislation authorizing the program. This means that all the authority to obligate and expend is not controlled centrally in the Appropriations Committee. Public debt borrowing, which is reported by a standing committee other than the Appropriations Committee, carries with it the authority to spend the money borrowed. This is authority to withdraw money from the Treasury even though it is not contained in an appropriation act.

VIII. SECONDARY COMMITTEE CONTROL

The granting of appropriations covering rapidly moving programs, particularly under the performance budget[26] which re-

[24] See note 5 *supra*.

[25] See 171 Cong. Rec. 20235–36 (Pt. II) (1961).

[26] The Budget and Accounting Procedures Act of 1950, 64 Stat. 832 (codified in scattered sections of Title 31 of the United States Code) and Title IV of the National Security Act of 1947, as amended, 63 Stat. 585, 5 U.S.C. § 172 (1958).

lates the purpose of the appropriation to broad functions (operation and maintenance) rather than particular objects (transportation, salaries, fuel, printing and binding, etc.), may give relatively uncontrolled obligating authority over large sums of money to the Executive Branch. This possibility existed in the Department of Defense, where, for the sake of flexibility dictated by rapidly changing defense strategy, the defense appropriations for procurement, operation and maintenance, and research and development, are of a lump-sum nature. However, the loss of control was negated by requiring the justification of detailed programs before the Appropriations Committees of both Houses and the reporting of any significant departure to each committee. Thus, the Appropriations Committees, by giving definition to the programs to be executed, would, in effect, prescribe the detailed powers to be exercised by the Executive agency.

IX. AUTHORITY TO APPROPRIATE

To restore in part the imbalance in committee responsibility between the Appropriations Committees and the Armed Services Committees created by the requirement of the Appropriation Committees of detailed justification and reporting in the area of major defense procurement, the Congress enacted legislation which, in effect, brought the Armed Services Committee into the task of establishing the procurement program. This legislation required an authorization to appropriate (under the jurisdiction of the Armed Services Committee) before an appropriation could be made for the procurement of aircraft, missiles and naval vessels.[27] As a result, before the Appropriations Committee could report an appropriation bill for these purposes, the Congress had to pass legislation authorizing the appropriation.[28] The authorization to appropriate was made as broad as the appropriations. For this reason, in each of the Houses, both the Appropriations Committee and the Armed Services Committee joined together in a reprogramming procedure requiring clearance of certain program changes with both committees. The authority to appropriate was in addition to the basic substantive authority which found its origin under House Rule XXI in the standing committees other than the Appropriations Committee.

X. BUDGET EXECUTION

As a part of expenditure control, the Executive Branch usually proceeds under defense programs, as well as other programs, on

[27] Section 412(b) of the Military Construction Act of 1959, 73 Stat. 322, 5 U.S.C. § 171(a) (Supp. II, 1959).

[28] Act of June 21, 1961, 74 Stat. 94.

a fully funded basis unless the program was otherwise justified. To be on a fully funded basis, the obligating authority necessary to support all the contracts and other obligating action for the completion of the program must be enacted. This does not mean that all the contracts or obligating action under the program must be executed or taken in the year in which the program is initiated, but that the obligating authority necessary for completion must be available. Of course if all of the obligating authority is only available in annual appropriations, the contracts must be executed in the year for which the appropriations were made.[29] Any defense procurement contracts which seek to fulfill a program on an installment basis are considered as incremental procurement, which is currently prohibited without the approval of the Secretary of Defense[30] and the necessary reprogramming before the Committees.[31]

Mere obligation control is insufficient in budget execution; expenditure control must be exercised by requiring the appropriations to unfold as projected under the President's budgeted expenditure rate. Using all of the obligations for the initial stages of contract accomplishment, such as building ships without funding for the electronic or ordnance requirements, means heavy expenditures in earlier stages. For instance, the President employed appropriations in fiscal year 1961 to commence ship construction which was a part of the proposed fiscal year 1962 program. The appropriations used had been set aside to fulfill, in 1962, the procurement programs established and funded in 1961. Thus, the Navy was able to contract for additional Polaris submarines in 1961 with appropriations set aside to cover proposed 1962 contracts for the completion of electronic and missile requirements for previously authorized ships. When the fiscal year 1962 appropriations were adopted, the money requirements and the previously authorized vessels became fully funded and each procurement requirement could be contracted for as scheduled. It should be noted that at no time were the obligations created greater than the appropriations available. What happened was the act of merely expanding to the scale of billions of dollars the practice employed by the housewife when she uses a part of next month's rent money, which she had set aside, to buy this week's food requirements, which were expanded by unexpected visitors, in anticipation of reimbursing the rent money from next month's food budget.

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[29] 63 Stat. 407 (1949), 31 U.S.C. § 712(a) (1958).

[30] Dep't of Defense Directive No. 7200.4 (May 21, 1957), 22 Fed. Reg. 4139 (1957).

[31] H.R. Rep. No. 380, 87th Cong., 1st Sess. 10 (1961).

XI. PROGRAMMING

It can be seen that the defense budget is not a fixed plan which must be followed by the Department of Defense as justified to the Congress. The budget is merely the legal vehicle to meet military requirements and support programs necessary to offset the everchanging threat of the unpredictable Mr. Khrushchev. For this reason, programming has become of primary importance in financial management. The Secretary of Defense has recognized this need by establishing program packages which are systematic, continuous and comprehensive efforts to relate spending to the particular jobs to be done rather than to the extremely broad functions set forth in the appropriations. As the missions change, the money in the budget can be controlled under new programs within the broad authority granted. This particularization of the task being performed gives better definition of the area of costs and permits proper planning for future costs related to a single weapon system in terms of required research and development, initial procurement and subsequent operation and maintenance. This effort has the support of the Senate Committee on Government Operations, not only in the area of defense spending, but also in the total area of economic projections.[32]

XII. OBLIGATIONS AND EXPENDITURES

It must be recognized that obligation authority is given, in the case of the procurement of long-lead items, for an indefinite period which could cover many fiscal years. Accordingly, the obligations created in any particular year may flow from authority granted in appropriation acts passed one to five or more years before the authority is exercised. Also, expenditures made in any particular year may be in liquidation of an obligation created one to ten or more years before. This expenditure toward the liquidation of the obligation may not be its final fulfillment. Payment may be made in advance,[33] or as progress payments or cost reimbursement as well as for delivery. Thus, dozens of appropriations with obligation authority originating in different fiscal years come to expenditure focus in a particular year establishing the expenditure rate for that year. As heretofore stated, Congress, in giving the obligation authority in appropriations or contract authority did

[32] A study submitted to the Senate Committee on Government Operations by its Subcommittee on National Policy Machinery, 87th Cong., 1st Sess. (1961).

[33] Armed Services Procurement Reg., App. E, Defense Contract Financing Regulation. This regulation covers the types of payments permitted to finance defense contractors.

did not fix the year of expenditure for the fulfillment of the authority granted. This is the task of the Executive Branch.

XIII. EXPENDITURES

The task of fitting the annual obligation fulfillment into an annual expenditure limitation requires fund adjustments both in time of use and amount of use. There may be many payments over many years. Yet, only that part of the program fulfilled in the year of initial authorization finds its expression in the estimates of expenditures to be made.[34] Nowhere in the annual budget is the estimate of expenditures required in future years for current programs made. Neither is there any time schedule of obligations to be incurred in succeeding years established against new obligation authority granted in the current year. Congress has not been given any idea of how and when the total obligation authority supporting a program will be employed.

XIV. RECORD OF OBLIGATIONS

Even though a record of obligations is maintained, such accounts do not fully reflect the total expenditures which will be made to fulfill the contract document recorded. Prior to the enactment of section 1811 of the Supplemental Appropriation Act of 1955,[35] the various Government agencies attempted to record a maximum figure as the measure of the liability under the obligation. Since these estimates of total eventual payment were always on the high side, the Congress limited the amount which could be recorded to the limit of liability shown in the legal document and measured as of the time of its execution. Costs increases expected to take place, such as change orders, escalation, spare parts, price redetermination and indemnification, which statistically were inevitable, were not recorded until the events were documented and priced out. Thus, the record of obligations under the required law does not give a full picture of the expenditure impact of a procurement action.

XV. CONTINGENT LIABILITIES

The obligation recorded initially at the time a contract is executed does not reflect any contingent liabilities which may be

[34] See The Budget of the United States Government for the fiscal year ending June 30, 1962. The expenditure estimates are for the current year only and are against all obligation authority to be exercised, whether or not granted in the current budget.

[35] 68 Stat. 830 (1954), 31 U.S.C. § 200 (1958).

liquidated under the contract at the time when the event which fixes the liability occurs. The provisions of current federal contracts which provide for the manufacture of modern complex weapon systems or the creation of nuclear reactor plants must, of necessity, provide for many contingencies in production and subsequent use which are not included in the initial price established under the contract. Change orders may be extensive, depending upon the problems created by the unfolding physical sciences as well as the changing threat of the Sino-Soviet Bloc. Price changes due to labor and material escalation were common events in the past decade. Changes in Government furnished components must be accompanied by parallel changes in the completed weapon system. Losses due to the destruction of Government furnished material are absorbed by the Federal Government and generally must be covered by the appropriations supporting the procurement of the material. Government furnished components may become obsolete or destroyed before completion of the weapon system, thereby requiring replacement under additional collateral contracts not initially contemplated.

XVI. INDEMNIFICATION

A contingent liability of consequence is contained in defense contracts (where extrahazardous risks exist) which provide for the indemnification of a Government contractor for any tort liability to third persons for property loss or personal injury during the manufacture of the product or during the subsequent use of the product. To avoid the objection that the indemnification provisions establish an indefinite obligation against the Government,[36] it becomes necessary to establish a monetary limit on the indemnification liability. Where the end product is a nuclear reactor or any other product which may have potentially enormous destructive power, the contractor would naturally seek the greatest coverage permitted under outstanding contract authority or appropriations. The full residue in the appropriation account is sought. In the case of one-year appropriations, this would be measured by the right of restoration from the Treasury based upon all the withdrawals made from the expired appropriation. After transfer to the successor account, it would be measured by the aggregate right of restoration to the successor account.

Where no specific contract authority exists, such as exists for research and development work,[37] for indemnification in the pro-

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[36] 35 Comp. Gen. 85 (1955), and cases cited therein.
[37] 10 U.S.C. § 2353 (1958).

curement of end items, then, if the procurement can only be obtained with the indemnification provisions, the measure of indemnification permitted would be the total funds available at the time the event occurred which fixes the liability. In the case of continuing appropriations, it would be the total unobligated funds available to the Federal agency at the time of the fixing of the liability under the indemnification provisions.

This could have the effect of wiping out the total moneys available for the major procurement program under which the initial purchase was made. It would be much more proficient to have continued procurement authority assured by providing for contract authority to cover the obligation arising from the happening of the condition subsequent.[38] In the case of expired appropriations, there are no unobligated balances in the appropriation unless there is a termination of an outstanding contract resulting in a deobligation. For this reason, the measure of available funds usually is the right of restoration based upon the total withdrawals made for transfer to the Treasury

XVII. ATOMIC ENERGY INDEMNIFICATION

With the sudden development of nuclear reactors, it is understandable that insurance companies would limit their liability in this area.[39] Atomic energy is being extensively used and soon the experience gained will permit a calculation of risks involved. In fact, two insurance pools have been established which will assume risks up to certain established limits.[40] The Atomic Energy Commission, in accordance with the statute which provides for industrial uses of atomic energy, has executed indemnity agreements in this area, connected with private insurance pools.[41] The authority to indemnify has been granted to the Atomic Energy Commission, but no similar authority has been granted to the military departments, except as regards research and development work.[42] Accordingly, the exercise of the power of indemnity by the Department of Defense must be a part of the procurement requirement and within the obligation limitations defined. The procurement contract entered into by the Department of Defense

[38] The Department of Defense is currently seeking the passage of legislation establishing this contract authority.

[39] See Office of Gen. Counsel, U.S. Dep't of Navy, Navy Contract Law § 8.50 (2d ed. 1959).

[40] 10 C.F.R. (Atomic Energy Commission Regulations), Part 140—Financial Protection Requirements and Indemnity Agreements.

[41] Atomic Energy Act of 1954, 68 Stat. 921, as amended, 42 U.S.C. §§ 2010–2281 (1958).

[42] 10 U.S.C. § 2354 (1958).

can only contain the indemnification provision if this is the only way that the procurement can be accomplished. It is considered an inherent power of the procurement authority, and, as a part of such procurement authority, it is the limit of obligation authority contained in the procurement appropriation.

XVIII. OBLIGATIONS INCURRED

In exercising its Constitutional power over appropriations, Congress usually sets a limit on the time period for which appropriations remain available for obligation.[43] Appropriations are considered to be one-year, multiple-year or no-year appropriations.[44] Although one-year appropriations are only available for obligation in the year in which they are made, the obligation recorded may be increased under any adjustment in price permitted to be made within the terms of the contract. This usually occurs under change orders issued under the contract. Before the change may be made subsequent to the year of appropriation of the annual funds, it is necessary, first, that provision for the issuance of the change order be incorporated in the original contract and be in compliance with such provisions; second, that the change ordered be a part of the contract; and third, that the purpose of the change does not enlarge the scope of the original contract.

This problem does not exist in the case of no-year appropriations which are available for obligation for an indefinite period of time. To make an appropriation available on a continuing basis, an express provision is required to avoid the statutory presumption in favor of one-year availability.[45] The rule that an appropriation can be obligated only during the fiscal year in which it was made was adopted in the first year of the Republic[46] and except as specifically provided by law, it has been followed consistently since that time.

XIX. EXPIRING APPROPRIATIONS

Continuing appropriations normally continue available for obligation until they are exhausted. This is not true of one-year

[43] Permanent exceptions to this rule are enumerated in section 7 of the Act of August 24, 1912, 37 Stat. 487, as amended, 31 U.S.C. § 718 (1958). In addition, Congress may authorize payments to be made out of moneys derived from the sale of public debt securities of the Federal Government. See H.R. Rep. No. 216, 85th Cong., 1st Sess. 9 (1957).

[44] See section 21 of the Bureau of the Budget Circular No. A–34 (July 1957).

[45] See note 43 *supra*.

[46] Act of Sept. 29, 1789, 1 Stat. 95.

appropriations or multiple-year appropriations. These latter appropriations cease to exist for obligation availability when the year or years established for their use have passed. The appropriations are said to expire. When an appropriation expires and is no longer available for obligation, the obligated but unexpended balance remains available for expenditure in the appropriation account to liquidate the outstanding obligations for a period of two years. At the end of two years after the appropriation has expired, this balance is transferred to a successor account and the appropriation is said to lapse.[47] Prior to the transfer to the successor account and at the end of each of the first, second and third years of the existence of the annual appropriation, the unobligated balances are withdrawn from the account and transferred to the Treasury. This, however, does not prevent the making of price and other obligation adjustments to any of the outstanding obligations. Adjustments not in excess of the aggregate of previous withdrawals made are permitted and funds are restored to the appropriation to cover the adjustments made. This right of restoration, measured by the total withdrawals made, continues until the appropriation lapses and is transferred to the appropriate successor account.

XX. SUCCESSOR ACCOUNTS

Successor accounts are established to cover the same general purposes as the lapsing appropriations they succeed. Into each successor account is merged the obligated but unexpended balances of all comparable one-year and multiple-year lapsed appropriations. These successor accounts then become available indefinitely for the payment of obligations chargeable against any of the appropriations from which the particular successor account was derived.[48] Claims chargeable to the successor accounts may be paid, or may be denied, without action by the General Accounting Office, except for those claims which involve "doubtful questions of law or fact" or are otherwise expressly required by statute or General Accounting Office regulation or decision to be settled before payment by that office or are barred by an applicable statute of limitations.[49]

Claims required to be settled by the General Accounting Office are "barred unless such claim, bearing the signature and address of the claimant or of an authorized agent or attorney, shall be received in said office within ten full years after the date such

[47] Act of July 25, 1956, 70 Stat. 648, 31 U.S.C. §§ 701–8 (1958).
[48] *Ibid.*
[49] 7 G.A.O. Directive 2080.70 (1958).

claim first accrued. . . ."[50] Prior to the law providing for the establishment of the successor accounts, the lapsed appropriations were required to be transferred to a certified claims account. Expenditures chargeable to lapsed appropriations could be made therefrom only if the Comptroller General first certified the payments to be lawfully due.[51] Upon establishment of the successor accounts, the proceeds of the certified claims account were transferred to each of the successor accounts available for comparable purposes. Obligation adjustments may be made against the successor accounts in the same manner and extent as could be done against the expired appropriations. Restorations may be made to a successor account to the extent of the withdrawals made from that successor account, from the lapsed appropriation accounts transferred to it and from the certified claims account tranferred to it. This means that the adjustments made to outstanding obligations against a particular lapsed appropriation are measured by the total amount availble to the successor account rather than to the particular appropriation account cited in the contract. Upon transfer to the successor account, the lapsed appropriation account loses its identity and takes on the total expenditure and obligation availability of the successor account with which it is merged.[52]

XXI. FINANCIAL MANAGEMENT CHANGES

The Congress has passed various laws setting forth three basic requirements leading to the improvement of financial management in the Executive Branch. First, all Federal agencies must place their accounting on an accrual basis;[53] second, all appropriations in the budget presented to Congress must be based on costs;[54] and finally, annual accrued expenditure limitations shall be placed upon each appropriation.[55] This last requirement expires on April 1, 1962 and probably will not be renewed.

Before these improvements can be accomplished, the Congress must first consolidate its control over obligation authority granted and then perhaps it can evolve a system of expenditure limitations which will be meaningful to a balanced budget. In fact, the Federal budget should be reviewed so that all receipts and expenditures are shown on a gross basis and are related to a total balanced

[50] Section 1 of the Act of October 9, 1940, 54 Stat. 1061, 31 U.S.C. § 71a (1958).

[51] Act of July 6, 1949, 63 Stat. 407, repealed by § 7(b) of the Act of July 25, 1956, 70 Stat. 650 (effective June 30, 1957).

[52] See note 47 *supra*.

[53] Act of August 1, 1956, 70 Stat. 783, 31 U.S.C. §§ 24, 66a(c) (1958).

[54] *Ibid.*

[55] Act of August 25, 1958, 72 Stat. 582, 31 U.S.C. § 11(b)–(f) (1958).

budget tied into a debt limit which excludes revenue-anticipation borrowing and a capital acquisition self-liquidating debt.[56] Fund control should be kept separate from cost controls flowing out of accrual accounting. Cost accounting is more effective as an instrument of evaluation and should not be tied into the obligation control now exercised by Congress. Obligation control will only be accomplished if it is centralized in the Appropriations Committee, where obligation and expenditure control can be exercised over back-door financing legislation as well as over appropriation acts. At the same time in those special areas, such as obligation authority necessary to cover extraordinary contingent liabilities, contract authority can and should be granted. In the case of contingent liabilities, probability of liability should be actuarially evaluated and recorded so that the dimension of potential payments may be evidenced at all times. Finally, the test of recording obligations should be related to the evidence of statistical probability wherever a pattern of expenditure repeats itself, rather than to wait for the incidence of the strict legal liability as shown in a subsequent definitive document. This strict compliance with the law covering the recording of obligations fails to provide a proper statement of obligations necessary for Congressional evaluation of obligation control. The Department of Defense has established a system of commitment accounting which compensates to some degree for the failure of obligation recording to give a full picture of obligation action. The criteria therein established could be used to amend the current legal criteria for recording obligations. With the accomplishment of these changes at Congressional levels, similar efforts can then follow at all levels of the Executive Branch.

Inherent in the clarification of obligation control suggested above is the requirement that both the past and future be related to present evaluation. Programming is a vehicle for tying future planning into current obligation authority availability. It provides the pattern of growth as well as the test of accomplishment. It makes meaningful to management, in terms of defined areas of effort, the progress made or denied which cannot be discernible in the enormous amorphous lump sums appropriated for an organization possessing more assets than the 500 largest industrial corporations in this country.

The broader the language is in the appropriation and in the authorizing legislation, the less definitive is the budget which gives the plan for fiscal accomplishment. The budget ceases to be a tool of control and for this reason, the programming which derives

[56] See Chermak, *Fitting Accounting Technique to Purpose*, 19 Pub. Admin. Rev. 173 (1959).

from the meaningful particulars below must become this tool of control. Its proper operation would permit longer budgetary projections than found in the single year budget document. Every action taken would be related in its particulars to at least a five-year plan which can be constantly adjusted to the pressures of the present. Obligation control would merely establish the outside boundaries of this vibrant bundle of programs.

MILITARY LOGISTIC SUPPORT OF CIVILIAN PERSONNEL OVERSEAS UNDER STATUS OF FORCES AGREEMENTS *

BY RICHARD S. SCHUBERT**

I. INTRODUCTION

A. *LOGISTIC SUPPORT OF CIVILIANS*

The United States military establishment includes numerous civilian personnel in its manpower. This serves the purpose of freeing the highest possible number of uniformed service personnel for tactical assignments and provides continuity of experience in Armed Forces activities. In order to uphold the operational effectiveness of this portion of Armed Forces personnel, the three services provide logistic support to their civilian employees as well as to limited categories of non-governmental, nonmilitary individuals who provide essential services or substantial assistance to the accomplishment of the United States mission. Dependents of military personnel are likewise beneficiaries of this contribution of material resources in merchandise, services and other benefits. The scope and type of logistic support is prescribed in Armed Forces regulations, both as to categories of eligible recipients as well as to the specific items of merchandise and services furnished.[1]

* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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[1] *Cf.* Air Force Reg. No. 147-14/Army Regs. No. 60-20 (Feb. 27, 1959) (Exchange Service—Operating Policies); Air Force Reg. No. 145-15 (Jan. 4, 1960) (Individuals and Organizations Authorized Commissary Store Privileges) and Army Regs. No. 60-21 (May 14, 1959) (Exchange Service—Personnel Procedures); Air Force Reg. No. 30-6 (Jul. 22, 1960) (Assignment and Occupancy of Public Quarters and Rental Housing) and Army Regs. No. 210-12 (Jan. 12, 1954) (Establishment of Rental Rates for Quarters Furnished Federal Employees); Air Force Reg. No. 34-50 (May 9, 1955) (Elementary and Secondary Education of Dependents in Overseas Areas) and Army Regs. No. 350-290 (Dec. 21, 1955) (Education of Dependents in Oversea Areas); Air Force Reg. No. 182-20/Army Regs. No. 65-10 (Mar. 10, 1955) (Agencies and Personnel Entitled to Use the Army-Air Force Postal Service); and Air Force Reg. No. 160-73 (May 15, 1957) (Persons Authorized Medical Care) and Army Regs. No. 40-108 (Mar. 5, 1959) (Persons Eligible To Receive Medical Care at Army Medical Treatment Facilities).

B. *LOGISTIC SUPPORT AREAS*

The grant of logistic support, and the eligibility therefor, assumes a much greater and more vital meaning to personnel and their dependents stationed outside of the continental limits of the United States and its territories and possessions. Frequently a member of the American forces abroad cannot provide himself with the necessities or conveniences of life on the local economy because they are not available there at all, or are available only in inferior qualities or at prohibitively high prices. In earlier times, prior to the present prosperity of most European countries (and today still in less fortunate overseas areas in Europe, Africa and Asia), competition by American personnel with the local population for scarce, often rationed, goods and services and the fear of generating inflationary prices were factors causing American military authorities to keep their members out of the local market. Currently gold flow considerations, the limited military capacity to provide transportation of necessary goods from the United States, and the difficulty in supplying sufficient and capable manpower for the performance of the services involved in furnishing logistic support, all contribute to the problems involved in performing the logistic function.

C. *EFFECT OF STATUS OF FORCES AGREEMENTS*

In overseas areas, particularly those within the European theaters of command which are discussed in this study, all these elements are reflected in the controlling rules of the Status of Forces agreements concluded by the United States with the foreign countries in which American personnel are stationed. Since these forces are stationed in such countries by grant of the host governments, the intergovernmental agreements authorizing the stay of American military forces and their civilian components and dependents in the foreign territory must, by necessity, be determinative of the scope and type of logistic support granted and the categories of personnel entitled thereto. These agreements invariably authorize the military forces of the United States to furnish all permissible items of logistic support to any of its uniformed service personnel, but they establish more complicated rules of eligibility for civilian personnel and dependents. In its regulation concerning issuance of a Uniformed Services Identification and Privilege Card,[2] the Air Force provides a care-

[2] Dept. of Defense Form No. 1173, governed in the Air Force by Air Force Reg. No. 30–20 (Oct. 20, 1957) and in the Army by Army Regs. No. 606–5 (May 12, 1961).

fully prepared chart to facilitate the identification of persons entitled to the benefits and privileges of logistic support. In addition, because of the increased complexity involved in oversea areas, the three services issued a regulation (or instruction) on Logistic Support of United States Nongovernmental, Nonmilitary Agencies and Individuals in Oversea Military Commands,[3] which was suitably implemented by the oversea commands by command regulations and supplements or circulars.[4] The Joint United States European Command (Hq, US EUCOM) likewise published an appropriate directive on the subject matter.[5] These and other pertinent Air Force regulations and major oversea (air) command supplements take careful account of the effect of the provisions of the applicable intergovernmental agreements and related factors.[6] This study will deal with the most complex features of the subject problem, *i.e.*, entitlement to logistic support of civilian personnel of the United States military establishment overseas, in the widest sense, under the controlling intergovernmental Status of Forces agreements. The question of the scope and type of specific items of logistic support will not be covered. This latter question can easily be determined by inspecting the numerous pertinent Armed Forces regulations and major oversea command regulations and supplements.

D. *RELATIONSHIP OF U. S. DIRECTIVES TO STATUS OF FORCES AGREEMENTS*

The Army and Air Force regulations and overseas supplements relative to logistic support ordinarily empower the appropriate overseas military commander to exceed or to limit the scope of

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[3] Army Regs. No. 700–32/Navy Publication OPNAV Instruction No. 4000–40/Air Force Reg. No. 400–15 (Aug. 17, 1956).

[4] Hq. U.S. Air Forces in Europe (USAFE), U.S. Dept. of Air Force, Supp. No. 1 to Air Force Reg. No. 400–15 (Sept. 16, 1959); Hq. USAREUR, U.S. Dept. of Army, Circular No. 700–32 (Nov. 10, 1960) (Logistic Support of Nongovernmental Agencies and Individuals).

[5] Hq. US EUCOM, U.S. Dept. of Defense, Directive No. 60–8 (Dec. 20, 1957) (Logistic Policy—General—Logistic Support of United States Nongovernmental Agencies and Individuals).

[6] *Cf.* Hq. USAFE, U.S. Dept. of Air Force, Supp. No. 1 (Nov. 10, 1959) and 1A (Dec. 22, 1959) to Air Force Reg. No. 147–7, para. 12*a* (Feb. 27, 1959) (Exchange Service—General Policies); Air Force Reg. No. 147–14, sec. XII, para. 53 (Feb. 27, 1959) (Authorized Patrons—Privileges at Oversea Exchanges); AR No. 60–20, C 5/Air Force Reg. No. 147–14B, sec. XIII, para. 56 (July 12, 1960) (Items Authorized for Sale—Oversea Exchanges); Hq. USAFE, U.S. Dept. of Air Force, Supp. No. 1 (Nov. 15, 1960) and No. 2 (May 16, 1961) to Air Force Reg. No. 147–14, paras. 5*a*, 53, and 56*a*, *supra;* AR 60–21/Air Force Reg. No. 145–15, para. 5 (Jan. 4, 1960); Hq. USAFE, U.S. Dept. of Air Force, Supp. No. 1 to Air Force Reg. No. 145–15, paras. 1 and 1*r* (Feb. 18, 1960); AR 65–10/Air Force Reg. No. 182–20, paras. 3 and 5 (March 10, 1955).

logistic support both with respect to the specific items of support granted as well as to the categories of authorized personnel, subject to the limitations of the applicable Status of Forces agreements.[7] Where, of course, the internal American military regulation fails to include the type of individuals to whom the person requesting support belongs, or to authorize the item of support sought, logistic support will not be granted even though the provisions of the governing Status of Force agreement are broad enough to encompass them. On the other hand, where the person requesting the support is entitled thereto under United States laws and regulations, but does not come within the categories of personnel permitted to receive military support under the applicable Status of Forces Agreement, or where the item of support sought is not authorized therein, the right of the oversea commander to grant the logistic support involved to the requesting individuals can be effected only with the consent of the host government authorities. Such consent may be in terms of a waiver, sometimes may be tacitly given, or may require negotiation of an amendment to the overall Status of Forces agreement.[8] Accordingly, there will be individuals who, when overseas, are excluded from receipt of military logistic support in its entirety or in part, which would be available to them in the United States.[9]

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[7] AR 700–32/OPNAVINST 4000–40/AFR 400–15, *supra* note 3, para. 4, states: "General Policy. Commanders of oversea areas are authorized to furnish logistic support on a reimbursable basis to eligible individuals and agencies covered by these regulations in accordance with the principles specified herein. The decision as to whether an agency or individual is eligible to receive logistic support under the policies and principles of these regulations rests with the commander of the oversea command. . . ." Paragraph 5*a* (4) of this regulation states: "Logistic support may be furnished only when all of the following conditions are met. . . (4) The furnishing of such support is consistent with the terms of any agreements which the United States has entered into with the governments of the nation concerned." Hq. USAFE, U.S. Dept. of Air Force, Supp. No. 1 to the above regulation (Sept. 16, 1959) adds to the foregoing the following: "Commanders will insure that the furnishing of logistic support conforms to any intergovernmental, diplomatic, or military service level agreements, including implementing exchanges of notes and other correspondence between the authorities of the United States and those of the host country concerned. Some of these documents are classified and not available at all echelons. Any doubtful cases will be referred to this headquarters for advice."

[8] US EUCOM Directive No. 60–8, *supra* note 5, para. 3, states in this respect: "It should be recognized that conditions vary among the host nations as regards the availability of goods and services from the local civilian economy and as regards the degree of restriction in international agreements of the authority of the U.S. forces to extend support. . . ."

[9] Hq. USAFE, U.S. Dept. of Air Force, Supp. No. 1 to Air Force Reg. No. 30–20 (Sept. 12, 1958), contains the following significant paragraph: "The verifying officer must be familiar with and apply all directives which contain authority for an applicant to receive certain benefits and privileges in accordance with the pertinent provisions of the intergovernmental agree-

II. CIVILIAN PERSONNEL ENTITLED TO U. S. LOGISTIC SUPPORT OVERSEAS UNDER STATUS OF FORCES AGREEMENTS

The provisions of intergovernmental Status of Forces agreements relating to the grant of military logistic support to eligible personnel are usually found in two different parts of those agreements. First, the agreements contain a section dealing with the right or authority granted to the Armed Forces by the host government to establish and operate logistic support facilities and services for specified authorized personnel. Secondly, since the members of the forces and their dependents are normally those individuals so authorized, the agreements contain a section which defines the concept of members of the forces and their dependents. Although it is rare, the provisions of the first part may sometimes authorize the operation of logistic support facilities for categories of persons going beyond those included in the definition of members of the forces and their dependents. The eligibility of personnel to receive logistic support, accordingly, cannot be determined without a careful inquiry into the applicable Status of Forces agreement.

A. *CATEGORIES OF CIVILIAN PERSONNEL INVOLVED*

In light of the distinctions usually made or resulting from Status of Forces agreements, civilian personnel, as hereinafter discussed, normally comprise the following categories of personnel: (1) United States citizen civilian employees (civil servants) of the Armed Forces assigned to oversea positions; (2) nonappropriated fund employees, service organization employees and similar non-Federal employees, such as employees of the American Red Cross; (3) technical representatives or experts and other contract technical service personnel affiliated and on duty with one of the services under special regulations; (4) other nongovernmental, nonmilitary individuals in overseas commands providing essential services or substantial assistance to one of

ments between the United States and the host country. For example, in oversea areas certain civilians accompanying the US Forces, and dependents, such as parents, parents-in-law, and dependents of retired or deceased service personnel, may not be considered to be 'members of the force or civilian component' or 'dependents' as defined in the applicable Status of Forces Agreements, which usually restrict certain logistical support privileges to persons so defined. Accordingly, unless these restrictions have been removed by bilateral arrangements between the United States and the host country, certain categories of persons must be denied certain privileges in oversea areas which they would be automatically entitled to in the United States."

the services, either under private or Government contract, and officially invited to travel to the oversea military command; (5) Third Country citizen employees of one of the services; and (6) the dependents of the above categories of persons.

A special comment appears required with respect to *Third Country citizen employees.* These individuals are non-citizens hired and employed by armed service activities in certain countries overseas, including such nonappropriated fund activities as post exchanges, clubs and messes.[10] They are normally recruited from outside of the country to which they are ultimately assigned for duty and of which they are neither citizens nor residents. Third Country citizen employees are mostly German, British, French, Italian and Greek, although there are also some Irish, Maltese, Lebanese, Egyptians and Pakistani.

The economic, social and working conditions in the countries in which they work require the furnishing of logistic support to them in varying degrees, depending on the differences in living standards of the place of work and those of their own country or the requirements of providing recruitment incentives. Their legal situation is, in most aspects, similar to that of the United States citizen employees and, hence, is generally covered in the discussion of the latter. The entitlement of Third Country citizen employees to American logistic support in foreign countries is predicated on their status as members of the forces or the civilian component, as the terminology may be, in the host country concerned. If they were not accepted as members of the forces or the civilian component, they would have to be employed as local wage rate personnel (formerly called "indigenous personnel"). As local wage rate personnel they would have to be administered under terms and conditions substantially complying with the labor law of the host country.[11] However, the conduct of these

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[10] Hq. USAFE, U.S. Dept. of Air Force, Supp. No. 1 to Air Force Reg. No. 160–73, para. 1*k* (July 21, 1961) (Medical Care—Persons Authorized Medical Care) defines "Third Country Nationals" rather inconclusively as follows: "Non-US Citizens employed by the United States Air Force or other activity performing services for the United States Air Force outside their native country (*i.e.*, appropriated and nonappropriated funds, contractors, etc.)." The place of birth ("native country") is not decisive, of course; it is the citizenship which is primarily controlling. *But see* the comprehensive policy directive issued by the Civilian Personnel Directorate, Hq. USAFE, U.S. Dept. of Air Force, governing the employment of third country citizens employed by the United States Air Force in the USAFE Area (1962).

[11] *Cf.* Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951 [1953], art. IX, para. 4, 4 U.S.T. & O.I.A. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 (herein referred to as NATO Status of Forces Agreement–NATO SOFA): "*Local civilian*

Third Country citizen employees cannot be influenced by the other means of control which, through the U. S. Embassies or diplomatic missions, can be applied to United States citizen employees, as holders of American passports and by reason of their allegiance to the United States and responsibility under American laws of extraterritorial effect.[12]

Retired military personnel, as a general rule, do not qualify as members of the forces under Status of Forces agreements and, consequently, are not normally entitled to receive the logistic support available to them in the United States; where so indicated suitable reference will be made to special conditions favorable to their situation in certain countries.[13]

B. *AMENABILITY OF CIVILIAN PERSONNEL TO UNITED STATES MILITARY LAW*

Some intergovernmental agreements condition the status of personnel as members of the forces or of the civilian component of the forces, or as dependents, on their being subject to United States military law. Before the United States Supreme Court decisions of January 1960[14] declared paragraph 11 of Article 2

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labour requirements of a force or civilian component shall be satisfied in the same way as the comparable requirements of the receiving State and with the assistance of the authorities of the receiving State through the employment exchanges. The conditions of employment and work, in particular wages, supplementary payments and conditions for the protection of workers, shall be those laid down by the legislation of the receiving State. Such civilian workers employed by a force or civilian component shall not be regarded for any purpose as being members of that force or civilian component" (emphasis added).

[12] See 75 Stat. 795 (1961), giving U.S. espionage statutes in Chapter 37 of Title 18 of the United States Code extraterritorial effect by extension of their application to violations of these statutes committed by United States citizens abroad.

[13] Hq. USAFE, U.S. Dept. of Air Force, Reg. No. 400–3, para. 3 (Feb. 15, 1961) (Logistic Support of Retired United States Service Personnel) states: "*Specific Policy:* In USAFE areas of responsibility, the policy of this hqs. is that retired personnel . . . and their accompanying dependents will be furnished all logistic support authorized by Air Force regulations and commensurate with our capability, provided such is not precluded by intergovernmental or bilateral agreements between the United States and the host country concerned. It is recognized that this policy will not permit uniform application of logistic support throughout the USAFE areas of responsibility as arrangements will vary from country to country. In each country area local commanders will provide as much support as local arrangements and circumstances will permit." See Hq. USAREUR, U.S. Dept. of Army, Circular No. 600–30 (June 23, 1959) (Logistic Support of Retired Military Personnel) for an equivalent policy with respect to retired Army personnel.

[14] McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Wilson v. Bohlender, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); and Kinsella v. United States *ex rel.* Singleton, 36 1U.S. 234 (1960)

of the Uniform Code of Military Justice[15] unconstitutional, civilians accompanying the military establishment overseas in peacetime were subject to the UCMJ. Upon issuance of these decisions, it was determined that, for the purpose of the application of intergovernmental agreements and of pertinent United States statutes and regulations, these civilians would be deemed to remain subject to American military law in its general sense. This determination was based on the concept that the term "United States military law" included all laws relating to the organization and government of the military establishment, including rules and regulations issued under the authority of the President as Commander-in-Chief, and those directives issued by the Secretaries of Defense and of the respective Armed Forces for the administration of the military establishment of the nation. The provisions of the Uniform Code of Military Justice, including those on courts-martial jurisdiction, which are no longer applicable to civilians in peacetime, are only a part of the entire body of law commonly referred to as "United States military law," as described above.

C. *PROVISIONS OF STATUS OF FORCES AGREEMENTS AFFECTING U. S. LOGISTIC SUPPORT TO CIVILIANS OVERSEAS*

1. *General*

The Status of Forces agreement of paramount importance here is the NATO Status of Forces agreement (NATO SOFA).[16] In the area of responsibility of Headquarters United States Air Forces in Europe (USAFE) thirteen countries are covered by that agreement, of which five apply the agreement in its orginal or only slightly implemented form; these countries are Belgium, Denmark, Luxembourg, Norway and Portugal. The other NATO countries,[17] excepting the Federal Republic of Germany whose accession to the NATO SOFA at the time of this writing has not become effective yet, have concluded supplementary or implementing bilateral agreements with the United States, to which reference will be made for illustrative purposes insofar as they are of an unclassified nature. The NATO SOFA is, in general, representative of Status of Forces agreements, including those

[15] Act of May 5, 1950, § 1, ch. 169, 64 Stat. 108 (effective May 31, 1951). Reenacted in 1956 as 10 U.S.C. §§ 801–940. Act of Aug. 10, 1956, § 1, ch. 1041, 70A Stat. 1, 36–79 (effective Jan. 1, 1957) (hereinafter referred to as the UCMJ or the Code and cited as UCMJ, art.).

[16] NATO Status of Forces Agreement, note 11 *supra*.

[17] Canada, France, Italy, Luxembourg, The Netherlands, United Kingdom, United States, Greece and Turkey.

which the United States has concluded with non-NATO countries such as Spain [18] and Libya.[19] In addition to the NATO SOFA, this study will also discuss the Bonn Conventions,[20] the current Status of Forces agreement with Germany (with suitable references to the Supplementary Agreement which together with the NATO SOFA will replace those Conventions in the future), and the Base Rights Agreement with Libya.[21] The treatment of the relevant provisions of the above Status of Forces agreements will be divided in two parts, in accordance with their customary division.[22] The first part will comprise those provisions which pertain to the grant of right or of authority by the host country to the United States military forces to establish and operate logistic support facilities and services for specified authorized personnel; the second part will deal with those provisions defining the concept of members of the forces and of the civilian component and their dependents.

2. *The NATO SOFA*

a. *Provisions Pertaining to the Right of the United States Forces to Operate Logistic Support Facilities*

The NATO SOFA does not expressly deal with specific items of logistic support. There are, however, provisions which indirectly affect the granting of logistic support. Thus, the agreement does not contain an express authorization by the receiving states permitting sending states to operate post exchanges and commissaries. However, the forces of a sending state such as the United States are permitted to import, duty-free, reasonable quantities of provisions, supplies, and other goods for the exclusive use of the force, and, in cases where such use is permitted by the receiving state, by its civilian component and dependents.[23]

Since exchange services are the traditional United States means of providing such provisions, supplies, and other goods to entitled personnel, the above clause of the NATO SOFA supplies

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[18] Defense Agreement With Spain, September 26, 1953, 4 U.S.T. & O.I.A. 1895, T.I.A.S. No. 2850, 207 U.N.T.S. 83.

[19] Agreement Relating to Military Bases in Libya, September 9, 1954, 5 U.S.T. & O.I.A. 2449, T.I.A.S. No. 3107, 224 U.N.T.S. 217.

[20] Convention on the Rights and Obligations of Foreign Forces and Their Members in the Federal Republic of Germany, with annexes, May 26, 1952, as amended by the Paris Protocol, Oct. 23, 1954 [1955] 6 U.S.T. & O.I.A. 4278, T.I.A.S. No. 3425, 332 U.N.T.S. 3, and as supplemented by the Convention on the Presence of Foreign Forces in the Federal Republic of Germany, October 23, 1954 [1955] 6 U.S.T. & O.I.A. 5689, T.I.A.S. No. 3426 (herein referred to as the (Bonn) Forces Convention).

[21] See note 19 *supra*.

[22] See text beginning at Section II *supra*.

[23] NATO Status of Forces Agreement, art. XI, para. 4.

an essential prerequisite to the functioning of U. S. Exchange Services overseas. When this clause was negotiated it was understood that the operation of American post exchanges and commissaries would be worked out on a bilateral basis in each country involved. Since the provisions of the agreement do not permit the importation of goods and supplies for the use of the civilian component and dependents without the express consent of the receiving state, NATO SOFA receiving states, where U. S. Post Exchange and Commissary facilities are operated, have expressly, sometimes tacitly, entered into an additional bilateral understanding with the United States permitting the importation of goods free of duty for civilians and dependents. These understandings have either expanded or limited the scope of eligible civilian personnel and dependents.

Thus, the provisions of an exchange of notes between the United States and The Netherlands[24] authorize the Armed Forces to establish and operate, free of taxes, licenses or other charges, military sales exchanges and commissaries, as well as officers' clubs and similar activities for the use of members of the U. S. Forces and civilian components and their dependents. A subsequent special exchange of notes on March 31 and April 13, 1958, removed the doubts as to the scope of personnel authorized to use exchange facilities, since The Netherlands stated that it had, in principle, no objection to authorizing the sale of goods imported for the "military sales exchange" to persons other than U. S. Forces and civilian components and their dependents. Accordingly, military sales exchanges are now permitted to sell goods to American nationals who are officers and employees of the federal government resident in The Netherlands and entitled to diplomatic privileges as well as to their dependents over the age of 18. Also included were those American nationals sojourning in The Netherlands who, in the country where they are residing, enjoy diplomatic privileges, or what is known as the *libre permis* system.

Pursuant to the provisions of the United States-Turkish Implementing Agreement to the NATO SOFA,[25] the Armed Forces are authorized to operate, at agreed locations, such special military agencies as post exchanges, commissaries and officers' clubs

[24] Agreement Relating to the Stationing of United States Armed Forces in The Netherlands, with annex (Exchange of Notes), August 13, 1954, para. 9, 6 U.S.T. & O.I.A. 103, T.I.A.S. No. 3174, 251 U.N.T.S. 91.

[25] Agreement Relating to Implementation of the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces of June 19, 1951, with two minutes of understanding, June 23, 1954, para. 4, 5 U.S.T. & O.I.A. 1465, T.I.A.S. No. 3020, 233 U.N.T.S. 189.

without licenses, inspections or taxes and other charges, for sale of agreed categories of articles (including articles normally sold through U. S. special military agencies) to authorized American personnel.

b. *NATO SOFA Definitions of Civilian Component and Dependents*

The term *"civilian component,"* as used in paragraph 1(b) of Article I of NATO SOFA, clearly embraces all civilians directly employed by the military establishment of the United States stationed in the NATO receiving state concerned. Technical representatives and contract technicians cannot ordinarily be considered "employed" by the Armed Forces, in the common sense of this term, since they have no direct employment relationship with those forces. Background material to the negotiations of the NATO SOFA reveals a significant statement made in the Juridical Subcommittee Meeting of February 8, 1951, which considered Articles 1 to 6 of the United States draft. With regard to civilians accompanying the Armed Forces, the American representative agreed that it would be preferable not to include them in the definition of "armed forces;" they should, however, be covered by a separate definition. The definitions were to apply to all civilian components of the Armed Forces, whether they were employed by the Armed Forces or acting under orders; any reference to military law would thus be deleted.

The original United States draft defined "contingent" as including both military and civilian personnel covered by the military law of the sending state. Later, however, this concept was split up into "force" and "civilian component," the members of the latter having a more limited status, as can be noted, principally, in connection with Articles III and XI of NATO SOFA. Through the elimination of the reference to military law and the substitution of the criterion "employed by and serving with" the force, the number of civilians covered by the NATO SOFA was considerably reduced insofar as the United States was concerned, since the UCMJ then covered many persons not necessarily employed by the forces.

The United States delegation, moreover, specifically agreed to exclude Red Cross, YMCA, and USO personnel from the definition of civilian component. No material available to the writer indicates whether the position of the American representative that the definition of "civilians" should apply to all civilian components of the Armed Forces, including those employed by the Armed Forces as well as those acting under orders, was accepted

by the other NATO countries in agreeing on the present NATO SOFA definition of civilian component.

Within the general purview of the NATO SOFA (and subject to any different specific provisions of implementing bilateral agreements), technical representatives and contract technicians, contractors and contractor employees, retired military personnel, federal government employees of other than the military establishment, and dependents related to the military or civilian sponsor other than a spouse or child depending on him or her for support, can not be deemed members of the civilian component or dependents under NATO SOFA itself.

Civilian employees must be nationals of a state which is a party to the North Atlantic Treaty, the United States or otherwise, and must not be stateless or nationals of, nor ordinarily resident in, the receiving state in which the force is located. Neither the text of the NATO SOFA nor the background papers thereto furnish guidance in interpreting the term "ordinarily resident," which is susceptible to varying determinations under the civil law and common law concepts in effect in the different NATO SOFA countries.

Accordingly, to determine whether an individual is a member of the civilian component, all available facts and circumstances, including the place of his hire, must be considered. It is important to note that an individual who has been recruited outside the receiving state and who enters the receiving state as a member of the civilian component or for the purpose of becoming such a member (and the dependents of such a person)[26] will prima facie qualify as a member of the civilian component. This is not the case with respect to persons who are physically present and hired inside a receiving state, and hence, might be deemed ordinarily resident in the receiving state by its authorities. However, the requirement that a person be a national of a NATO country, and that the individual not be stateless, ordinarily resident or a national of the receiving state does not apply to dependents as defined in paragraph 1(c) of Article I of NATO SOFA.

[26] *Cf.* NATO Status of Forces Agreement, art. III, para. 5, which reads as follows: "If the receiving State has requested the removal from its territory of a member of a force or civilian component or has made an expulsion order against an ex-member of a force or of a civilian component or against a dependent of a member or ex-member, the authorities of the sending State shall be responsible for receiving the person concerned within their own territory or otherwise disposing of him outside the receiving State. *This paragraph shall apply only to persons who are not nationals of the receiving State and have entered the receiving State as members of a force or civilian component or for the purpose of becoming such members, and to the dependents of such persons*" (emphasis added).

In the case of husbands who ordinarily are resident in and nationals of the receiving state, recognition as a dependent is generally denied by the host country unless it can be shown that the dependent husband is in fact depending on his sponsor wife for his support.

NATO SOFA host countries have generally accepted the United States' legal proposition that nonappropriated fund activities are United States Government instrumentalities, although they are not financed from general revenue. Employees of these activities, including clubs and other sundry establishments, are deemed to be members of the civilian component of the United States military force and qualify, with their dependents, for the logistic support available to such members. The foregoing rule also applies to Third Country citizen employees of the Armed Forces and nonappropriated fund activities, since the definition of civilian component also covers this class of individuals.

The NATO SOFA concept of the civilian component and of dependents can, as a general rule, be expanded only in implementing bilateral agreements or legally equivalent specific arrangements with the receiving state. Thus, the provisions of the U.S.-Netherlands exchange of notes[27] expands the expression "dependent" of paragraph 1(c) of Article I of NATO SOFA so as to include relatives who habitually reside with and are actually dependent on a member of a U.S. Force or civilian component. The U.S.-Turkish Implementing Agreement[28] expands the definitions in paragraph 1(b) and (c) of Article I of NATO SOFA so as to include: persons "who are in the employ of" the U.S. armed services including employees of U.S. military organizations, U.S. Government departments, post exchanges and recreational organizations for military personnel, Red Cross and USO personnel, and technical representatives of contractors with the U.S. Forces who are assigned to U.S. military organizations in Turkey, under the assumption that all these persons are subject to American military law.[29] This agreement provides for further expansion by allowing the United States Government to discuss inclusion of other specific categories with the authorities of the Turkish Government. These individuals need not be American citizens to qualify for membership in the civilian component, but they must not be stateless, nationals of, or ordinarily resident in

[27] Agreement Relating to the Stationing of United States Armed Forces in The Netherlands, *supra* note 24, para. 1.

[28] Agreement Relating to Implementation of NATO Status of Forces Agreement, *supra* note 25, paras. 1 and 2.

[29] See the text beginning at Section II–B *supra*.

Turkey, and must hold citizenship in a NATO country. If so qualified, Third Country citizen employees of the above employing agencies will also be full-fledged members of the American civilian component in Turkey and entitled to U.S. logistic support under the Status of Forces agreement. The same agreement takes in, under the definition of "dependent" in paragraph 1(c) of Article I of NATO SOFA, all persons of American citizenship who are relatives of and, in accordance with U.S. laws and regulations, are dependent for support upon and actually reside with any member of a force or the civilian component.

Retired military personnel not otherwise serving with the U.S. Forces are not ordinarily accepted by NATO receiving states as members of the forces within the meaning of paragraph 1(a) of Article I of NATO SOFA. However, subject to the consent of the receiving state, certain aspects of implementing arrangements with a receiving state may permit some favorable treatment.[30] In the United Kingdom, under an existing arrangement with the local authorities, the use and resale of goods in post exchange stores and other establishments is restricted to American service personnel and other American personnel subject to military law. This would appear to enable certain retired regular military personnel to qualify for limited logistic support, provided it can be shown that they are subject to American military law during their residence in the United Kingdom. It would exclude retired military personnel who are staying in the United Kingdom in a tourist status or on an extended permit, or retired reserve officers, except when receiving hospitalization from an armed force.[31] Where the item of logistic support requested does not require exemption from local customs and taxes or does not involve undue utilization of facilities provided by the receiving state for members of the force, the support item may be made available to the retired military individual overseas, subject to objections by the receiving state. This would apply in particular to certain services in hospitals, and also, in recreational establishments such as clubs, theaters, or open messes.

The general rule stated above notwithstanding (that the concept of members of the civilian component and dependents of the NATO SOFA can be expanded by bilateral agreements only), factual circumstances tend to lessen the severity of this rule under certain conditions. In borderline cases, where the definitions of eligible personnel or the description of logistic support in intergovernmental agreements do not permit a clear-cut determination

[30] See note 13 *supra*.
[31] UCMJ, art. 2(5).

whether a certain individual is or is not entitled to logistic support, concepts developed from American laws and regulations, particularly as reflected in pertinent armed service regulations, are utilized as a yardstick. Vice versa, technical terms appearing in intergovernmental agreements may have a broader meaning for the purpose of these agreements than under American laws and regulations. Thus, the term "technical representative" may have a broader meaning for the purpose of establishing entitlement of such individuals under intergovernmental agreements using that term. There are, furthermore, instances where logistic support may be granted to an individual whose eligibility therefor is not clear, on a provisional and precarious basis, subject to objections which may be raised by the authorities of the receiving state concerned. Where no such objections are raised on the part of a receiving state, although it is aware of the grant of logistic support to the individual, its silence may be construed as tacit consent to enlargement of the scope of the civilian component thus effectuated. It is to be emphasized, however, that in the absence of a general agreement or understanding with the authorities of a receiving state, the mere fact that logistic support has, as a matter of fact, been granted to an individual for a length of time cannot be considered as establishing a general legal standard. Such actions must remain primarily a matter within the realm of policy and expediency.

3. *The Bonn Forces Convention*

This is, at the time of this writing, the current Status of Forces agreement with the Federal Republic of Germany.[32] Comparative remarks will be included on the NATO SOFA and Supplementary Agreement thereto (German Forces Arrangements) which will, in the near future, replace the above convention as the controlling Status of Forces agreement. Accession of the Federal Republic of Germany to the NATO SOFA will become effective upon full ratification by all signatory states of the Supplementary Agreement thereto.[33]

a. *Provisions of Forces Convention Authorizing the U.S. Forces to Operate Logistic Support Facilities*

The establishment and operation by the Armed Forces of post exchange and commissary facilities in Germany are not

[32] See note 20 *supra*.

[33] See Schubert, *Criminal Jurisdiction Under the Agreement To Supplement the NATO Status of Forces Agreement With Respect to Foreign Forces Stationed in Germany*, U.S. Air Force JAG Bull., January 1960, p. 3, which outlines, in the introductory portion, the intricacies of the forthcoming changeover in the status of forces agreements controlling U.S. Forces in Germany.

expressly referred to in the intergovernmental agreements (Bonn Conventions) with the Federal Republic. However, the forces are permitted to bring into the Federal territory their property and property intended for their use or that of their members without payment of any duties or other Federal taxes, and without restrictions or prohibitions.[34] The conventions further permit assimilation to the forces of non-German enterprises of a noncommercial character upon notification to the German authorities that such organizations are in the service of the forces.[35] This provision would appear to enable the forces to operate PX's, even in the event the German authorities would not recognize them as integral parts of the American military establishment, because of their status as nonappropriated fund activities.

For these reasons, the American Embassy, in notifying the Federal German authorities pursuant to paragraph 1 of Article 36 of the Forces Convention, included military nonappropriated fund activities, as defined in regulations of the respective United States Armed Services, subject to the following parenthetical remark: "As these activities are U.S. governmental instrumentalities and integral parts of the United States Forces, it is not considered their assimilation or notification thereof actually necessary. Accordingly, in this regard, assimilation is effected and notification given only in technical compliance with Article 36."[36]

The currently applicable Ambassadorial note[37] provides for the assimilation of the American Red Cross and the University of Maryland and their employees. Likewise, the American Express Company and the Chase Manhattan Bank (Heidelberg Branch) and their employees are assimilated, subject to the following limitation, which specifies, in the part here pertinent, that employees of those banks will be assimilated to members of the forces to the extent of "the enjoyment of the tax exemptions granted members of the Forces, so far as the employees perform functions which otherwise would be performed by military fiscal agents of the United States."[38]

Other provisions of the (Bonn) Forces Convention dealing with logistic support do not expand the scope of entitled individuals, as established in the definition in paragraph 7(b) of Article 1

[34] (Bonn) Forces Convention, art. 34, para. 2.
[35] (Bonn) Forces Convention, art. 36.
[36] Letter From the American Embassy in Bonn to Federal Republic of Germany, Note No. 9, May 13, 1955.
[37] Ambassadorial Note No. 454, May 8, 1958.
[38] Letter From the Allied High Commission to the Minister of Finance, Federal Republic of Germany, subject: "Employees of Banks," May 26, 1952.

and the concluding subparagraph of the Forces Convention. Insofar as the new German Forces Arrangements combine the features of NATO SOFA with the basic rules and approach of the (Bonn) Forces Convention, it will not be surprising to learn that authorization to operate logistic support facilities is not expressly stipulated in the Supplementary Agreement but is to be inferred from the provisions of the NATO SOFA, discussed above, and the provisions of Article 65 of the Supplementary Agreement which takes the place of Article 34 of the Forces Convention.

b. *Provisions of the Forces Convention as to Categories of Civilian Personnel Entitled to Logistic Support*

Paragraph 7(b) of Article I of the Forces Convention includes in the definition of members of the forces, any persons who are in the service of such Armed Forces or attached to them. Dependent spouses and children of the defined military or civilian personnel, and close relatives who are supported by such persons and for whom such persons are entitled to receive material assistance (meaning logistic support) from the United States are likewise considered members of the forces. It can easily be seen that, under the above provisions, a great variety of civilians are considered members of the forces in the Federal Republic of Germany, since they need not be directly employed by, but must merely be attached to, the forces in order to qualify as their members. Fringe categories of personnel are covered in Article 36 of the Forces Convention, which provides that non-German commercial enterprises which furnish technical services under contract to the forces and their employees may be assimilated to the forces after notification to, or, if they provide other than technical services, after consultation with, the German authorities.

In 1955 the U.S. Forces in Germany assimilated under paragraph 2(a) of Article 36 of the Forces Convention, among others, "Miscellaneous agencies under technical contract to furnish technical consultants and representatives covered by travel orders issued by one of the respective United States Armed Services."[39] Pursuant to paragraph 3 of Article 36, which permits assimilation of employees of the above-named organizations (with the exception of German nationals and persons who are nationals neither of one of the Three Powers nor of another sending state and who have been engaged in the Federal territory) to members of the forces, the aforementioned Ambassadorial letter[40] further stated that the employees of all organizations thus assimilated to

[39] Letter, note 36 *supra*.
[40] See note 36 *supra*.

the forces, under paragraphs 1 and 2(a) of Article 36 of the Forces Convention, are assimilated to members of the U.S. Forces in Germany.

This situation has been maintained by the currently applicable Ambassadorial note on assimilation,[41] which in addition to designating the Bendix Radio Corporation, the Electronics Division of the General Electric Company and the Martin Company and their employees as assimilated, states that "individuals serving the U.S. Forces, such as Technical Representatives, and attached to them by the Department of the Army, Air Force or Navy individual travel orders are members of the U.S. Forces as defined in Article 1 of the (Bonn) Forces Convention, even though, in some cases, the organizations and enterprises which employ them are not assimilated."[42]

The broad language of Article 36 of the Forces Convention, as well as of the Embassy's letter of May 8, 1958, can certainly be used to justify the extension of logistic support to certain field service representatives and their families in Germany, in addition to technical representatives and contractor personnel, if so desired.

A special situation exists with respect to *retired military personnel* in that, under agreement with the German authorities, they are admitted to post exchanges for the purpose of the purchase of non-rationed goods.[43] Accordingly, such retired military persons are not being furnished ration cards but are admitted to P.X.'s on the basis of their ID cards. They are warned by special notices that they are not members of the forces and that

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[41] See note 37 *supra*.

[42] See text accompanying note 37 *supra*, respecting the assimilation of employees of the American Express Company and of the Chase Manhattan Bank (Heidelberg Branch). The employees of six named assimilated insurance companies are *not* assimilated.

[43] See Hq. USAFE, U.S. Dept. of Air Force, Reg. No. 400–4, para. 2*a* (1) (Nov. 6, 1961) (Logistic Support of Retired US Service Personnel in the Federal Republic of Germany), which reads as follows: "The following items of support are authorized retired US military personnel . . . and their accompanying dependents in Germany: (1) Commissary privileges, except the purchase of rationed items (AFR 145–15 as amended and supplemented). USAFE Ration Card (USAFE Form 193) and Commissary Coffee Ration Card (AE Form 2637) will not be issued. The purchase of unrationed items is permitted but all items purchased are subject to German customs duty. Payment of these taxes at the local German Customs Office (Zollamt) is the responsibility of the purchaser and failure to pay renders the individual subject to German legal action." See also Hq. USAREUR, U.S. Dept. of Army, Circular No. 600–30 (June 23, 1959) (Logistic Support of Retired US Military Personnel), establishing policies governing the logistic support provided for retired U.S. military personnel in Germany substantially similar to the quoted USAFE regulation.

their purchases are subject to German customs and taxation. Failure to report such purchases without delay to the nearest German Customs Office (Zollamt) renders the purchaser liable to prosecution under German law.

It should be noted that Third Country citizen employees need not be nationals of the United States, the United Kingdom, France, Belgium, Denmark, Canada, Luxembourg or The Netherlands.[44] Under paragraph 7 of Article 1 of the Forces Convention, in order to qualify as members of the forces, Third Country citizen employees must have been engaged in their present positions with the forces outside of the German Federal Territory; otherwise they will become members of the forces upon their engagement only if they are nationals of any of the foregoing countries. Residence is not a factor.

Dependents are not merely spouses and children of entitled personnel (irrespective of whether they are depending upon the sponsor for support as would be required under NATO SOFA), but also other close relatives who are supported by authorized personnel and for whom such personnel are entitled to receive material assistance (logistic support) from the forces. The latter phrase means that pertinent American laws and regulations authorize these relatives to receive military logistic support.

It is to be emphasized that the definition of civilian members of the forces and dependents in the Forces Convention is much broader than that in NATO SOFA, and accordingly, certain civilians, and also, certain dependents, who are not authorized logistic support in NATO SOFA and other overseas countries may at the present be entitled to such support in the Federal Republic of Germany.

The situation is somewhat different under the forthcoming German Forces Arrangements. The definitions of "force," "civilian component," and "dependent" of the NATO SOFA are less extensive and, it may be said, less generous or liberal than those of Article 1 of the (Bonn) Forces Convention. The Supplementary Agreement, in Article 2, and additional arrangements, do not further expand the NATO SOFA definitions, except with respect to close relatives, dependents left behind by the sponsor departing from the Federal territory, and leave personnel, and, accordingly, will significantly diminish the scope of personnel entitled to privileged status.

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[44] These are the so-called *sending States* under the (Bonn) Forces Convention, as recognized in the German announcement of effectiveness in the German Federal Gazette, Pt. II, at p. 630 (1955).

With respect to "force," meaning uniformed military personnel, the Federal German Government has recognized in paragraph 5 of the Agreed Minute to paragraph 1(a) of Article I of NATO SOFA that military and civilian members of U.S. Forces stationed in Berlin, while on leave in the Federal territory, will be considered as members of the forces. Moreover, in the special agreement between the Federal Republic of Germany and the United States on the status of personnel on leave, the Federal Republic has further accepted American military and civilian personnel stationed in Europe or North Africa as members of the force while on leave in the Federal territory, subject to certain conditions respecting jurisdiction. The requirement of the NATO SOFA that personnel, in order to belong to the force, must be in a North Atlantic Treaty area in connection with official duties, has, therefore, been eliminated.

With respect to the civilian component, civilians must now accompany the force and be in its employ; being "in the service of" or "attached to" the force, as formerly provided in paragraph 7(b) of Article 1 of the Forces Convention, does not suffice. Civilians, furthermore, must be nationals of a NATO country, and must not be stateless, German nationals or ordinarily resident in the Federal territory. Formerly, nationals of non-NATO and of the other NATO countries could become members of the forces, provided they were engaged for employment outside of the Federal territory.

A close relative must now be a person who is financially, or for health reasons, dependent on or supported by a member of the forces, who shares the quarters of that member and is present in the Federal territory with the consent of the forces. Additionally, dependents left behind by a sponsor who died or moved on permanent change of station will be deemed to remain privileged dependents for a period of 90 days.[45] Any service personnel enjoying diplomatic status, such as those serving with military assistance groups, are now definitely excluded from the scope of "force."[46]

Of particular interest is the treatment of affiliated organizations and enterprises in the Supplementary Agreement in comparison with the treatment resulting from the provisions of paragraph 7(b) of Article 1, and Article 36 of the Forces Convention as implemented by the pertinent Ambassadorial notes.

[45] See German Forces Arrangements, arts. 2, 2(b).
[46] See NATO Status of Forces Agreement, art. I, para. 1(a), Agreed Minutes, para. 2.

The Agreed Minutes to NATO SOFA[47] specify 13 nonappropriated fund activities, *e.g.*, EES, AFEX, Class VI, European and USAFE Motion Picture Service, AFN, Dependent Schools, Stars & Stripes, etc., and recognize them as integral parts of the forces. Other nonappropriated fund organizations, including authorized clubs and messes, enjoy the same status, subject, however, to the proviso that they must conduct tax and customs-free procurement through officially designated procurement agencies of the force, in accordance with agreed procedures. The American Red Cross and the University of Maryland, to the extent necessary for the fulfillment of their specific purposes, are granted a limited privileged status, exclusive of the powers enjoyed by the force and, therefore, must conduct tax and customs-free procurement through the official procurement agencies of the force.[48]

The assimilation of other *non-German, non-commercial* organizations can, under the German Forces Arrangements, be accomplished only by means of specific administrative agreement, provided that these organizations are necessary to meet the military requirements of the forces and operate under the general direction and supervision of the forces. Under paragraph 1 of Article 36 of the Forces Convention, the above organizations could be assimilated by mere notification to the German authorities stating that they are in the service of the forces.[49] Of the *non-German commercial organizations,* the American Express Company and Chase Manhattan Bank are granted tax, customs, and trade license exemptions, to the extent necessary for the fulfillment of their purposes; other benefits may be given to them by administrative agreement. They must, however, exclusively serve the force or its members and engage in activities which cannot be undertaken by German enterprises without prejudice to the military requirements of the force. If they perform mixed activities, they must make a clear legal or administrative separation between those activities performed for the force and those performed for the general public. These banks must not conduct activities which might influence the German market, and, in particular, they are barred from the German stock market.[50] Other non-German commercial enterprises may, by special agreement with the German authorities, and on the conditions set forth above, be given all or part of the exemptions and benefits granted to the two aforementioned banks.

[47] NATO Status of Forces Agreement, art. I, para. 1(a), Agreed Minutes, para. 4(a).

[48] See German Supplementary Agreement, art. 71, paras. 2 and 3, and Agreed Minutes thereto.

[49] See German Supplementary Agreement, art. 71(4).

[50] See German Supplementary Agreement, art. 72(1).

This is a distinct difference from the situation under paragraph 2 of Article 36 of the Forces Convention, where these organizations, if they provided needs which could not be satisfied by German enterprises, could be assimilated to the force by mere notification to the German authorities, if they performed technical services under contract with the force, and after consultation with the German authorities in all other cases. Similar restrictions control the assimilation of employees of the above organizations. These restrictions apply only to commercial enterprises, corporations or companies operating, *i.e.*, having corporate presence, within the Federal Republic of Germany. Technical experts, however, are specifically recognized as members of the civilian component, if they serve the force exclusively in an advisory capacity in technical matters or for the purpose of setting up, operating or maintaining equipment.[51]

4. *The Base Rights Agreement with the United Kingdom of Libya*[52]

a. *Provisions Authorizing the Establishment and Operation of Logistic Support Facilities*

Article XVII of the Base Rights Agreement authorizes the establishment by the U.S. Government, in agreed areas, of agencies, including concessions such as sales commissaries, military service exchanges, messes and social clubs, for the exclusive use of members of the U.S. Forces and nationals of the United States having comparable privileges, free of all licenses, fees, excise, sales or other taxes or imposts. By means of a special Memorandum of Understanding, concerning base privileges,[53] it was further agreed that the phrase "nationals of the United States having comparable privileges" in Article XVII of the Base Rights Agreement means: Those persons who have international diplomatic privileges and also other persons who are granted diplomatic privileges under special agreements with the Government of the United Kingdom of Libya. This was understood to include the Chief of the United States Diplomatic Mission in Libya, the diplomatic officers of his staff, the United States Marine security guards assigned to the Embassy, and the American Military Assistance Advisory Group as defined in Article V of the Military Assistance Agreement,[54] all subject to conditions to be

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[51] See German Supplementary Agreement, arts. 72(4) and 73.

[52] See note 19 *supra*.

[53] Memorandum of Understanding Concerning Article XVII of the Agreement of September 9, 1954, Relating to Military Bases in Libya, November 3, 1960, T.I.A.S. No. 4620.

approved by the Ministry of Foreign Affairs of the United Kingdom of Libya. Under the same conditions permission to use the facilities mentioned in Article XVII was also granted American personnel of the United States Operations Mission in Libya paid directly from funds of the United States Government and, on the basis of reciprocity, non-diplomatic American personnel assigned to the U.S. Embassy in Libya.

b. *Provisions as to Categories of Civilian Personnel Entitled to Logistic Support*

Whereas the term "nationals of the United States having comparable privileges" as used in Article XVII of the Base Rights Agreement is defined in the separate Memorandum of Understanding referred to above, the term "members of the United States forces" used in that article, is defined in Article XXVIII of the agreement as follows: " 'United States forces' includes personnel belonging to the armed services of the United States of America and accompanying civilian personnel who are employed by or serving with such services (including the dependents of such military and civilian personnel) who are not nationals of, nor ordinarily resident in Libya; and who are in the territory of Libya in connection with operations under the present Agreement." The article also provides a definition of the term "military purposes," which includes operations of contractors of the federal government and of authorized services organized under the Base Rights Agreement.

Thus, individuals, such as technical representatives and field service representatives, appear to be entitled to logistic support in Libya since they serve with the armed services and are stationed in Libya in connection with operations under the Base Rights Agreement. The scope of entitled civilian personnel is, therefore, broader than under the NATO SOFA. The agreement includes additional categories of entitled civilian personnel by use of the term "nationals of the United States having comparable privileges," as subsequently interpreted in the separate U.S.-Libyan Memorandum of Understanding. In this respect the Base Rights Agreement with Libya offers a good example of expansion of the scope of civilian personnel entitled to logistic support by means of provisions which were primarily intended to grant authority to establish and operate logistic support facilities.[55]

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[54] Military Assistance Agreement With Libya, June 30, 1957, 8 U.S.T. & O.I.A. 957, T.I.A.S. No. 3857, 284 U.N.T.S. 177.

[55] See the text beginning at Section II *supra*.

III. CONCLUSION

This study is intended to provide information and guidance of a general nature. It only deals, therefore, with such cases, or groups of cases, which experience has shown arise so frequently in overseas countries that some overall conclusions can be reached and guidelines provided. There are other questions and situations involving logistic support which, though they have arisen more than once and in more than one country, either cannot be considered to be of sufficient general interest, or which are, because of their peculiar character, not susceptible of a treatment designed to point out general rules. This applies to such problems as entitlement to logistic support of dependents remaining in a receiving state after the death, or departure to another overseas station or to the United States, of their sponsor, or as arise in connection with the privileged status occasionally granted to specific groups of civilians in inter-governmental arrangements covering limited special projects to which these civilians render assistance. These questions must be left for resolution to the responsible staff judge advocate on a case to case basis.

The furnishing of logistic support to civilian personnel in overseas areas is, as the foregoing discussion demonstrates, subject to many, frequently conflicting, factors which affect the scope and number of logistic support items granted and of the personnel entitled thereto. The principle, however, of furnishing such support to civilian personnel, particularly overseas, is a safely established institution and tradition of the United States military establishment and has been successfully carried over into, and defended, in the negotiation of status of forces agreements.

COMMENTS

TREASON BY DOMICILED ALIENS.* Treason is a crime usually associated with offenses by a citizen against his own sovereign or government, and is accordingly most often associated with national or domestic law. There is, of course, no question that a citizen of a country, who levies war, adheres to enemies or gives them aid and comfort, commits the offense of treason against his government and may be prosecuted and punished for his acts.

There is, however, an aspect of treason which involves international law. Aliens who are domiciled within a nation may be prosecuted for treason under the laws of the majority of the countries of the world.[1] The doctrine of responsibility of an alien for treasonable acts takes on new importance in a world where modern inventions have enhanced the possibilities for aiding the enemy, and the strategy of infiltration is urged as a means of conquest.

I. DOMICILED NEUTRAL ALIENS

The responsibility of an alien to obey the laws of the country in which he resides is well recognized, the theory being that he receives the protection of the laws of the country of residence, consequently he owes to that country allegiance as well as an obligation to obey its laws, and he may be punished for treasonable acts. *Protectio trahit subjectionem et subjectio protectionem.*

This principle is well established in United States and English law. In England it was discussed in an early case,[2] it is set forth in Blackstone's Commentaries,[3] and it is included in Sir Michael

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* The opinions and conclusions presented in this article are the private ones of the author and are not to be construed as official or reflecting the views of the Navy Department, the Department of Defense, The Judge Advocate General's School or any other governmental agency.

[1] Such is the rule in the United States, Great Britain, France and Germany. Only a few states, among which is the Soviet Union, follow the rule that only a citizen owes allegiance and so can commit treason. Foreigners who commit acts similar to treason are punishable under the provisions of the criminal code. *Cf.* Hazard and Stern, *Exterior Treason*, 6 U. Chi. L. Rev. 77, 87 (1938).

[2] Calvin's Case, 6 Jac. 1, 7 Co. Rep. 1A (1609).

[3] 1 Blackstone, Commentaries *370.

Foster's book on "Crown Law."[4] More recently it is stated to be accepted law in the case of *Rex v. Joyce*.[5]

In the United States, Chief Justice Marshall indicated that such was the law in this country, saying, "Treason is a breach of allegiance and can be committed by him only who owes allegiance, permanent or temporary."[6]

The first case in the United States to deal extensively with this matter resulted from the prosecution of Carlisle, a British subject.[7] Carlisle had settled in Alabama and was resident there at the outbreak of the Civil War. The Supreme Court held that he could have been prosecuted for treasonable acts against the United States but for the amnesty proclamation.[8] In the opinion, Chief Justice Field stated:

> The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence.
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> This obligation of temporary allegiance by an alien resident in a friendly country is everywhere recognized by publicists and statesmen. In the case of *Thrasher*, a citizen of the United States resident in Cuba, who complained of injuries suffered from the government of that island, Mr. Webster, then Secretary of State, made, in 1851, a report to the President in answer to a resolution of the House of Representatives, in which he said: "Every foreigner born residing in a country owes to that country allegiance and obedience to its laws so long as he remains in it, as a duty upon him by the mere fact of his residence, and that temporary protection which he enjoys, and is as much bound to obey its laws as native subjects or citizens. This is the universal understanding in all civilized states, and nowhere a more established doctrine than in this country." And again: "Independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance, or of renouncing any former allegiance, it is well known that, by the public law, an alien or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason or other crimes as a native born subject might be, unless his case is varied by some treaty stipulation."[9]

Through treason is a crime for which there have been few prosecutions in the United States, and even fewer prosecutions of aliens, there seems to be no question that a domiciled alien may be guilty of treason and that United States courts have juris-

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[4] Foster, Crown Law 183 (3rd ed. 1809). See also 1 Hales, Pleas of the Crown, ch. 10 (1736), and 1 East, Crown Law, ch. 2, § 4 (1803).
[5] 62 T.L.R. 57 (Crim. App. 1945), reported in 40 Am. J. Int'l L. 210 (1946).
[6] United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 97 (1820).
[7] Carlisle v. United States, 83 U.S. (16 Wall.) 147 (1873).
[8] *Ibid.*
[9] *Id.* at 154–55.

diction to try such persons for this offense.[10] The same is true for Great Britain and the Dominions.

II. DOMICILED ENEMY ALIENS

The case of the domiciled alien, whose native country becomes engaged in war with the country of his residence, presents a different problem, both for the individual and the nation involved. Here conflicting allegiances and loyalties are involved. The alien may be confronted with threats to his family or property remaining in his native land if he does not aid the government of that land. Particularly in modern times it can be expected that some pressure will be put upon him to supply information or perhaps perform acts of sabotage, for subversion and infiltration have become recognized weapons in modern war. The choice of the enemy alien is not an easy one, for it has long been held that he may be prosecuted as a traitor to the land of his residence if he performs treasonable acts, and if he is ordered to do so by his native country, and does not, then his friends and relatives may suffer, or his property in his homeland may be confiscated. Aliens who reside in and enjoy the protection of a country, who become alien enemies as a result of war between the country of their original allegiance and that of the country of their residence, and temporary allegiance, owe allegiance to the sovereignty of their residence before the war occurred, and if they remain in the country, this allegiance continues throughout the time of their residence and they may be prosecuted and punished therefor for treasonable acts.[11]

Prosecutions of enemy aliens have been few, since a sovereign has the right to deport alien enemies at the outbreak of war, and to take necessary security measures regarding those who are allowed to remain.[12]

The problem of the domiciled enemy alien becomes acute when the country of his origin conquers and occupies the area within which he lives. His double allegiance then becomes more than a theoretical problem. The conquerors are apt to seek him out to

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[10] See Young v. United States, 97 U.S. 39 (1878); Radich v. Hutchins, 95 U.S. 211 (1877); Janis v. United States, 32 Ct. Cl. 407 (1897), holding that an alien resident owes temporary allegiance to the nation (in this case an Indian Tribe) of his residence; Hagen and McKinney, *Spies and Traitors*, 12 Ill. L. Rev. 591, 612–14 (1918).

[11] 1 Hales, *op. cit. supra* note 4, at 59–60, 92–96; Hagen and McKinney, *supra* note 10.

[12] Rev. Stat. § 4067 (1875), as amended by the Act of April 16, 1918, ch. 55, 40 Stat. 531, 50 U.S.C. § 21 (1958).

aid them in furnishing information and to help them in governing the occupied territory. He then has the unenviable choice of deciding which master he will serve. If he fails to render the requested aid to the conquerors, his lot will undoubtedly be a hard one. If he renders aid to them against the government of his residence, he runs the risk of being considered a traitor, and prosecution therefor, if the territory is reconquered.

Considered solely from the standpoint of the individual, the foregoing doctrine seems strange and unjust, for he is placed in a position where he must be unfaithful to one of the two sovereigns to whom he owes allegiance. True, he can avoid criminal responsibility by rendering only obedience to the occupying power, and this is all he is required to do. In spite of some rather loose use of the word "allegiance" in two early United States cases,[13] it is universally recognized that occupation of territory does not constitute a change of either sovereignty or allegiance. The inhabitants are bound to give obedience to the occupying power but owe it no allegiance. Their duty of allegiance to the de jure sovereign continues and the protection of a state does not cease because its forces are withdrawn for strategic or other reasons.

The principle of the continued duty of allegiance by a domiciled enemy alien during a period of occupation by the forces of the nation of his original allegiance appears to have been first clearly announced in the case of *De Jager v. Attorney General of Natal.*[14] De Jager was a national of the South African Republic who for ten years had resided in the British Colony of Natal and was peaceably residing there at the time of the outbreak of war. He continued to live in that portion of Natal which was occupied by the Boer forces and during the period of occupation served with the Boer forces and aided and assisted them in their operations against the British. After recapture of this portion of Natal by

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[13] In the case of United States v. Hayward, 26 Fed. Cas. 240 (No. 15,336) (C.C.D. Mass. 1815), Justice Story, in holding that Castine was a foreign port for the purpose of the non-importation acts because it was under occupation by the British, said: "By the conquest and occupation of Castine, that territory passed under the allegiance and sovereignty of the enemy. . . . The sovereignty of the United States . . . was . . . suspended. . . ." 26 Fed. Cas. at 246. In Shanks v. Dupont, 28 U.S. (3 Pet.) 242 (1830), Justice Story stated that the capture and possession of Charleston by the British was not an absolute change of allegiance of the captured inhabitants. "They owed allegiance, indeed, to the conquerors during their occupation; but it was a temporary allegiance, which did not destroy, but only suspended their former allegiance." 28 U.S. at 246. Justice Story, in the opinion of the writer, unfortunately used "allegiance" and "obedience" as interchangeable words. It is well established that occupation alone does not change sovereignty of the occupied territory or the allegiance of its inhabitants.

[14] [1907] A.C. 326 (P.C.) (So. Afr.).

the British, De Jager was brought to trial for treason. It was held that, as an alien resident, De Jager owed allegiance to the crown, that the protection of the crown did not cease during the temporary withdrawal of the British forces, that he was under a duty to so act that the crown would not be harmed by having admitted him as a resident, and that he was guilty of treason. In the opinion in this case the Judge, Lord Loreburn, said:

> It would be intolerable, and must inevitably end in a restriction of the international facilities now universally granted, if, as soon as an enemy made good his military occupation of a particular district, those who had till then lived there peaceably as aliens could with impunity take up arms for the invaders.[15]

A note concerning the above case states:

> The rule laid down in the reported case that an alien who resides within British territory owes allegiance to the crown, and that if he lends assistance to invaders, during the absence of the state forces for strategical or other reasons, he is rightfully convicted of high treason, seems to have been generally followed in all cases which have arisen, involving a determination of the question, both in England and United States.[16]

No published cases in the United States have been found dealing directly with the duty of allegiance of an enemy alien to the nation of his residence when the place of his residence is occupied by the armed forces of the nation of his origin and permanent allegiance. However, there is a case which was tried by a Military Commission and was convened by order of the Island Commander, a marine general, on Guam after its reconquest by the United States forces in World War II.[17]

In this case, a native and national of Japan named Shinohara came to Guam in 1905 as a young man and settled there. He married a Chamorro woman on the island and had children. He and his family were in established residence there, and he was engaged as a salesman and a merchant. Shortly after December 7, 1941, when the Japanese attacked Pearl Harbor, he was arrested and placed in detention, where he remained until the Japanese landed and occupied Guam on December 10, 1941. He was released by the Japanese. During the period of occupation he was alleged to have aided the Japanese forces in securing certain machinery, in conducting an official club for Japanese officers, and in aiding in the military training of local youths for the Japanese. Upon the reoccupation of Guam he was arrested by the United

[15] *Id.* at 329.

[16] Annot., 8 Am. & Eng. Ann. Cas. 77 (1908). See also Hudson, Cases on International Law 1061 (3d ed. 1951).

[17] United States v. Shinohara, Military Commission Cases No. 134819, on file in the Office of the Judge Advocate General of the Navy.

States forces, imprisoned, and on July 28, 1945, brought to trial before a Military Commission. He was charged with treason, the specifications alleging, "that Samuel T. Shinohara, an inhabitant and resident of Guam and subject to the Military Government thereof, having been, prior, during and subsequent to the Japanese invasion and occupation of Guam, an inhabitant and resident of Guam owing allegiance to the Naval Government of Guam and the United States of America, did . . . knowingly and treasonably adhere to Japan, an enemy of the United States, and give aid and comfort to Japan."[18] Each specification added the times and acts separately alleged.

The question of whether Shinohara could be tried for treason and whether his acts were treasonable was forcefully urged at the trial. Strong argument was made that any allegiance he might owe to the sovereign of the land of his residence was terminated or overridden when Guam was occupied by the Japanese, to whom he owed permanent allegiance as a citizen of Japan. The Commission found Shinohara guilty of treason, and some other less serious offenses, and sentenced him to be hanged.

The case was reviewed by the Judge Advocate General of the Navy[19] who, in his opinion, said:

> There is no question that an alien owes a local allegiance to the country of his temporary sojourn, so that he may be indicted for treason either in levying war against the local sovereign, or in aiding such sovereign's enemies. 3 Wharton, Criminal Law (12th ed. 1932) sec. 2169. Such allegiance is the fidelity and obedience which the individual owes to the government under which he lives in return for the protection he receives. Authority for the prosecution for treason of an alien enemy under the circumstances involved in the present case is found in the widely cited case of De Jager v. Attorney General of Natal, A.C. (Eng.) 326, Hudson Cases Int. Law, p. 1061. Upon the authority of that case, Hallsbury's Laws of England (2nd ed.) Vol. 9, p. 291 states that—
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> "The essence of the offense of treason lies in the violation of the allegiance which is owed the King and which is due from all British subjects wherever they may be. This allegiance is owed not only by subjects of the King, but also by an alien living in this country and receiving the protection of its laws, so long as he is resident here, even if the State to which he belongs is at war with the King. If an alien has lived in this country under the protection of the law, and the State of which he is a subject invades the King's territory and the alien assists the invader, the alien is guilty of treason."

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[18] *Ibid.* He was also charged with other offenses not pertinent to this discussion.

[19] *Ibid.* Two specifications of treason were set aside for lack of sufficient proof and two specifications were affirmed. Conviction of one other less serious offense was also affirmed.

In view of the foregoing the military commission in this case had jurisdiction over the offenses of treason charged against Shinohara.[20]

The opinion of the Judge Advocate General was approved by the Secretary of the Navy, but the latter official commuted the death sentence to a sentence of fifteen years imprisonment, which was later further reduced.

It should be noted that the basis of the cases holding that a domiciled alien may be prosecuted for treasonable acts is long established residence. Members of the armed forces of an enemy are of course not subject to such a rule, nor are spies, enemy agents or others who are involved in hostility against a nation. The doctrine should not be extended to temporary tourists, although they are under the protection of the state visited while they are there. Nor does it appear that the doctrine should be applied to enemy spies or agents who come into a country immediately prior to an attempted invasion. These individuals may be punished under the laws of war, and under the provisions of municipal statutes, but should not be considered capable of treason against the visited state.

As stated above, the rule laid down in the *De Jager* and *Shinohara* cases seems harsh for the individual, but necessary for the protection of the many individuals who compose a nation, to the end that those who are received into its protection may not, with impunity, plan and encompass its destruction by aiding its enemies. The alien enemy has, in such a situation, only one safe choice. If he only renders obedience to the occupying power, as he is required by international law to do, he commits no offense against either his original or adopted country.

III. TREASONABLE ACTS OUTSIDE THE JURISDICTION OF STATE OF DOMICILE

In the case of *Rex v. Joyce*[21] the responsibility of the domiciled alien was extended to acts committed outside the realm. The question presented in this case was whether an alien who had lived for many years in England and who had secured a passport upon representation that he was an English subject, could be prosecuted for treasonable acts,[22] committed in Germany during the war, under the English Treason Statute of 1351.[23]

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[20] *Ibid.*

[21] 62 T.L.R. 57 (Crim. App. 1945), reported in 40 Am. J. Int'l L. 210 (1946).

[22] The acts alleged were aiding and assisting Germany by broadcasting anti-British and pro-German propoganda by radio.

[23] 35 Hen. 8, c. 2.

Joyce was born in the United States but had moved to Ireland and later to England at an early age. The decision was not based upon any theory of acquired citizenship, but upon the basis that he had acquired and held a British passport which had protective possibilities. The court deemed it unimportant that the passport afforded Joyce no actual protection during his stay in Germany after the beginning of hostilities. In considering whether treason committed outside the realm could be prosecuted in England, the case of *Rex v. Casement*[24] was cited for the proposition that the treason statute was passed for the trial of treasons committed out of the King's Dominion.

In the consideration of the *Joyce* case before the House of Lords, the proposition that the local allegiance of an alien is conterminous with his residence within the realm[25] was rejected. The Lord Chancellor stated:

> It would, I think, be strangely inconsistent with the robust and vigorous commonsense of the common law to suppose that an alien quitting his residence in this country and temporarily on the high seas beyond territorial waters or at some even distant spot now brought within speedy reach and there adhering and giving aid to the King's enemies could do so with impunity.[26]

The doctrine of an enemy alien's allegiance was carried further in the case of *Rex v. Neumann*.[27] In that case the defendant, a German national, who had resided in South Africa for some years prior to the outbreak of war in 1939, had married a South African national and had taken steps towards naturalization, enlisted in the South African Army and was captured by the Germans. Thereafter, he wore a German uniform and interrogated allied prisoners of war for the German Army. His pleas that the acts were committed abroad and that as an enemy alien he could not be tried for treason were rejected and he was convicted. Thus in this case, an enemy alien, who served the nation of his primary allegiance outside the realm of the nation of his temporary allegiance, was convicted of treason. This seems to be the furthest extension of the allegiance owed by a resident alien to the country of his residence.

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[24] [1917] 1 K.B. 98.

[25] Joyce v. Director of Public Prosecutions, [1946] 1 All E.R. 186 (H.L.). William Joyce was commonly referred to during World War II as Lord Haw-Haw. Under this view, allegiance is considered to be correlative with protection and ends when the alien leaves the state. See 1 Blackstone, Commentaries *370; 1 Blackstone, Commentaries 284 n. 5 (Chitty ed. 1847); Carlisle v. United States, *supra* note 7; 59 Harv. L. Rev. 612 (1946).

[26] [1946] 1 All E.R. at 190–91.

[27] [1949] 3 So. Afr. L.R. 1238, reported in 44 Am. J. Int'l L. 423 (1950).

In the United States there is no question that, under the treason statute,[28] those owing allegiance to the United States may be prosecuted for extraterritorial treasonable acts. The statute itself makes treason an offense whether committed "in the United States, or elsewhere." In the case of *United States v. Chandler*[29] the defendant's contention that the constitutional definition of treason did not cover adherence to the enemy by one residing in enemy territory was rejected. The court said:

> . . . [A]n alien domiciled in a foreign country as the defendant Chandler admittedly was during the periods alleged in the indictment was bound to obey all the laws of the German Reich as long as he remained in it, not immediately relating to citizenship, during his sojourn in it. All strangers are under the protection of a sovereign state while they are within its territory, and owe a local temporary allegiance in return for that protection. . . . At the same time a citizen of the United States owes to his government full, complete, and true allegiance. He may renounce and abandon it at any time. This is a natural and an inherent right. When he goes abroad on a visit or for travel, he must, while abroad, obey the laws of the foreign country, where he is temporarily. In this sense and to this extent only he owes a sort of allegiance to such government, but to no extent and in no sense does this impair or qualify his allegiance or obligations to his own country or to his own government.[30]

There appear to have been no United States decisions holding that the temporary allegiance owed by an alien resident continues after he departs from the country. The general tenor of the decisions in the United States indicates that an alien resident's allegiance is coterminous with residence.[31] In the case of *United States v. Villato*,[32] a Spanish subject came to Philadelphia, took an oath under the Pennsylvania law, but was held not to have acquired United States citizenship. Afterwards, he went to the West Indies and entered upon a French vessel, which during the undeclared war with France, captured an American brig. Villato was made prize master and subsequently was captured by the United States. The Supreme Court did not discuss his duty of allegiance as a resident alien, but dismissed his commitment on the basis that he was not a citizen and so could not be held for high treason.[33]

It seems likely that in the United States it would be held that an alien, and particularly an alien enemy who had returned

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[28] 18 U.S.C. § 2381 (1958).

[29] 72 F.Supp. 230 (D. Mass. 1947), also reported in 42 Am. J. Int'l L. 223 (1948), *aff'd*, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949), *rehearing denied*, 336 U.S. 947 (1949).

[30] 72 F.Supp. at 234–35.

[31] Carlisle v. United States, *supra* note 7; 59 Harv. L. Rev. 612 (1946); Charge to Grand Jury, 30 Fed. Cas. 997 (No. 18,256) (C.C.D. Mass. 1861).

[32] 2 U.S. (2 Dall.) 370 (1797).

[33] *Ibid.*

to the country of his origin, ceases to have the protection of the country of his temporary residence, and, by leaving the country, terminates any temporary allegiance he owed. This view seems more consistent with justice because the individual might otherwise, as an enemy alien in his own country, be placed in an absolutely untenable position. It is true that he may take advantage of his stay in the host country by illegally using information obtained there, but the prime practical reason for holding that an alien resident may commit treason is that he may have a great opportunity to spy, commit sabotage, or otherwise subvert a nation's laws while under its protection and hospitality. Once he has departed the country, and no longer enjoys its protection, and also no longer has the preferred opportunity to contravene its laws and attack its institutions while masking as a peaceable resident, it would appear that he should no longer be held to owe allegiance.

The decision in the case of *Rex v. Joyce*[34] has been characterized as an indication of a modern tendency to view treason as a universal crime. The theory of universality of jurisdiction, which assumes that each nation has jurisdiction over all crimes against either itself or other states committed by all persons no matter where they are committed, has little acceptance in either the United States or Great Britain.[35] The tendency of some states to extend their jurisdiction over aliens for crimes committed abroad has been noted.[36]

IV. CONCLUSION

Jurisdiction of a nation to try a domiciled alien for treasonable acts done in the host country is established in international law.[37] This jurisdiction continues during a period of occupation by enemy forces, and residents, even alien enemy residents, are not relieved of their obligation of allegiance during such an occupa-

[34] See note 21 *supra* and accompanying text.

[35] See, however, the remarks of Chief Justice Taney in Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 568–69 (1840).

[36] 1 Hyde, International Law, Chiefly as Interpreted and Applied by the United States § 241 (2d ed. 1945).

[37] The incident of Christopher Stephano indicates the United States attitude when one of its own nationals is detained by a foreign state. Christopher Stephano, a native American citizen, was held by Greek authorities on the suspicion of complicity in a revolution in 1935. The American Legation was instructed by Secretary of State Hull to make formal inquiry as to the charges against Stephano, *bearing in mind* that the Supreme Court of the United States had held that aliens domiciled in the United States owed this Government a local and temporary allegiance during the period of their residence and that they might become liable for prosecution for treason like a citizen. 2 Hackworth, Digest of International Law 84 (1941).

tion. In such a case, coercion by the enemy forces, certainly if it extends to a personal fear of death, should be a defense.[38] In the case of an alien enemy, the conflict of loyalties between the country of origin and the country of residence, should, even in the absence of actual coercion, be considered in mitigation, as it was by the Secretary of the Navy in the *Shinohara* case.

In spite of the decisions in the *Joyce* and *Neumann* cases, it is doubtful that it is a principle of international law that the allegiance of an alien, or alien enemy, continues after he has departed the country and no longer seeks or has its protection. The extension of allegiance on the basis of protection of a passport, when it was not shown that the passport afforded any protection, seems to be a tenuous basis and prejudicial to the right of individuals. The protection of individual rights in such a case would appear to outweigh any possible danger to a state. Changing conditions and the importance of infiltration and psychological strategy in modern world conflicts may, however, produce a different result.

ROBERT D. POWERS, JR.*

[38] United States v. Greiner, 26 Fed. Cas. 36 (No. 15,262) (E.D. Pa. 1861); Foster, Crown Law 14 (3d ed. 1809); MacGrowther's Case, 20 Geo. 2, 18 How. St. Tr. 391, 394 (1746).

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A FURTHER HISTORY OF SHORT DESERTION.* A learned authority on American military law, in discussing the history of "short" desertion, has advanced the thesis that it is a modern common law gloss on the law of desertion.[1] Short desertion consists of quitting a unit or organization or place of duty with intent to avoid hazardous duty or to shirk important service. If a short time scale is used, the thesis has some substance; if a wider time scale is used, it is more open to doubt. The following questions may be posed. Is the intention to remain away permanently the true criterion of desertion or is it merely a yardstick developed to distinguish desertion from absence without leave? Which offense was the first to develop, desertion or absence without leave? Did the original test of desertion incorporate any element of intention? Is short desertion consistent with the original test? Are common law glosses to be frowned upon as abuses of Parliamentary or Congressional authority? The present knowledge of the historical development of military law does not permit categorical answer to these questions, but some light can be thrown on them.

I. EMERGENCE OF DESERTION AS AN OFFENSE

The offenses of desertion and absence without leave were not native to British military law.[2] The early Articles of War do not refer to these offenses and their place was taken by a series of offenses whose central theme was that the absence of a soldier from the place at which he was required was punishable.

The Articles of 1385,[3] for example, prescribe the following offenses:

> V. That no one take quarters, other wise than by the assignment of the constable and mareschall and herbergers; and that after the quarters are assigned and delivered, let no one be so hardy as to remove himself, or quit his quarters, on any account whatsoever,

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* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency or of the Australian Department of Air.

[1] Avins, *A History of Short Desertion*, Mil. L. Rev., July 1961, p. 143. This article is intended to be a reply to the aforementioned article.

[2] Avins refers to the trial of deserters by the English civil courts early in the 17th century under an ancient statute (see Avins, *supra* note 1, at 144), but the legality of this approach was apparently open to doubt. See 3 Macaulay, History of England 38–46 (7th ed. 1850).

[3] 2 Grose, Military Antiquities 60 (1788). A list of the known English Articles of War and their location is contained in 4 J. Army Historical Research Soc'y 166 (1925).

under pain of forfeiture of horse and armour, and his body to be in arrest, and at the King's will.

VI. That every one be obedient to his captain, and perform watch and ward, forage and all other things belonging to his duty, under penalty of losing his horse and armour, and his body being in arrest to the mareschall, till he shall have made his peace with his lord or master, according to the award of the court.

XVII. That no one be so hardy as to raise a banner or penon of St. George or any other, to draw together the people out of the army, to go to any place whatsoever, under pain, that those who thus make themselves captains shall be drawn and hanged, and those who follow them beheaded, and all their goods and heritages forfeited to the king.[4]

The Articles of 1627[5] contain an embryonic form of absence without leave but it is merely one of several associated offenses:

14. Whosoever shall go out of his quarter from his Colours, or Garrison, further than a cannon shot, without his Captain's leave, shall be punished with death.

15. Whosoever shall forsake his Colours shall without mercy be punished with death.

16. Whosoever shall neglect his watch or any other service commanded him shall be punished with death.

18. Whosoever shall depart from such his watch when he hath been placed by his officer, unless he be called thence or relieved by his officer, shall receive punishment of death without mercy.

20. Whosoever shall absent himself out of the Corps de Garde without his officer's leave shall be punished with death.

25. No captain, lieutenant, or ensign, shall depart from his Garrison or quarter without sufficient leave on pain of death.[6]

In the Articles of War of 1642,[7] the approach was similar:

VI. . . . No Captain shall presume at his own hand without warrant of the Lord General, to cashier or give a pass to any enrolled Soldier or Officer who hath appeared at the place of the general rendezous. . . .

VII. . . . No Soldier shall leave his Captain nor servant forsake his master, whether he abide in the Army or not; but upon license granted and in an orderly way.

X. . . . In marching no man shall stay behinde without leave: No man shall straggle from his troop or Company. . . .

XIII. No man enrolled professing himself or pretending to be a soldier shall abide in the Army, unless he enter in some Company, or shall he that hath entered depart without license upon pain of death . . . and if any man shall stay out of his quarter or go without shot of cannon being entrenched, but one night, without leave of his superior officer he shall be punished. . . .

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[4] *Ibid.*
[5] 5 J. Army Historical Research Soc'y 3 (1926).
[6] *Ibid.*
[7] 9 J. Army Historical Research Soc'y 117 (1930).

XIV. Every man when the Alarum is given, shall repair speedily to his Colours; no man shall forsake or flee from his Colours. . . .[8]

In the Articles issued between 1660 and 1700,[9] desertion emerges for the first time as an offense. The following articles may be noted:

22. When any march is to be made, every man who is sworn shall follow his colours, and whosoever shall without leave stay behind, or depart above a mile from the camp or out of the Army without license shall die for it.

23. All Officers and Soldiers that shall desert either in the field, upon the March, in quarters, or in Garrison, shall die for it; and all soldiers shall be reputed and suffer as deserters who shall be found a mile from their garrison or camp without leave from the Officer commanding in chief.

24. No Officer or soldier shall leave his Colours and list himself into any other regiment, troop, or company, without a discharge from the Commander-in-Chief of the regiment, troop or company in which he last served, upon pain of being reputed a deserter, and suffering death for it, and in case any officer shall receive, or entertain any Non Commission Officer or soldier who shall have so deserted or left his Colours without a discharge, such Officer shall be immediately cashiered.

31. No Officer shall lie out all night from the Camp, Quarters or Garrison without his superior Officer's leave, upon pain of being punished for it as a Court-martial shall think fit. . . .[10]

The emergence of desertion in these articles was consolidated by the first Mutiny Act of 1689.[11] Mutiny, sedition and desertion became the gravest military offenses. Absence without leave in its modern form as a lesser and alternative offense to desertion emerged between 1700 and 1765. In Section VI of the Articles for 1765, the offenses of desertion and absence without leave are framed in a recognizable form.[12]

The Oxford Dictionary[13] provides an interesting commentary on the development of desertion. It defines the verb "desert" as having three meanings: (1) to abandon, forsake, relinquish or to depart from; (2) to forsake (a person, cause, etc., having moral or legal claims upon one) especially of a soldier or sailor, to run away from (the service, his colours, etc.); (3) to forsake one's duty, one's post, or one's party, especially of a soldier, etc., to run away from the service without permission. The dictionary

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[8] *Ibid.*
[9] Walton, The History of the British Standing Army (1660–1700), at 808 (1894).
[10] *Ibid.*
[11] Winthrop, Military Law and Precedents 929 (2d ed. reprint 1920).
[12] *Id.* at 934.
[13] Shorter Oxford Dictionary 489 (reprint 1950).

gives the date of origin of the second meaning as 1647 and the date of the third meaning as 1689, the year of the first Mutiny Act.

II. DESERTION AND INTENTION

It is difficult to appreciate the part played by intention in the offense of desertion without some knowledge of the influences which operated on British military law during the formative years of this offense. Simmons[14] and Winthrop,[15] during the last century, and Glenn and Schiller,[16] during the present century, drew attention to the continental influences on British military law during the 17th century.

The two main streams of influence were Swedish and Dutch. Winthrop remarks on the influence of the Articles of War of Gustavus Adolphus of Sweden issued in 1621. But the greater influence on the development of desertion was Dutch. The best known Dutch exponent of military law was Ayala, who held a position equivalent to that of Judge Advocate General with the Imperial Forces in the Low Countries at the close of the 16th century. Ayala published a scholarly book on the laws of war based principally on Roman military law in 1582.[17]

The major influence on the development of desertion was, therefore, Roman law. The word "desertion" is of Latin origin. According to Ayala, "A deserter, in legal intendment, is one who is recaptured after a long period of unauthorised absence."[18] There can be no doubt of the influence of this statement to this day. In the British court-martial appeal of *R. v. Mahoney*,[19] the Lord Chief Justice, Lord Goddard, in delivering the judgment of the court, stated:

> If a man is absent from October 9 to October 31, I should say that there is ample time for a court-martial to hold that he did not intend to return. Why he did not intend to return has to be explained by him. No explanation being given, there was ample evidence here on which the court-martial could hold that the appellant was absent from his unit from October 9 till his arrest on April 13, and therefore there was ample evidence that he has been absent for such a long time that, in the absence of any explanation by him, he intended to desert Her Majesty's Forces.[20]

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[14] Simmons, Courts-Martial 2 (7th ed. 1875).
[15] Winthrop, *op. cit. supra* note 11, at 19.
[16] Glenn & Schiller, The Army and the Law 41 (1943).
[17] Ayala, The Laws of War (Carnegie Institute transl. 1912).
[18] *Id.* at 216.
[19] 40 Crim. App. R. 172, 3 All E. R. 799 (1956).
[20] *Id.* at 175, 3 All E. R. at 801.

Roman law recognized absence without leave as a lesser offense. The broad difference between the two offenses was that the absentee was a truant or a wanderer, and the deserter was a fugitive.[21] One significant point is made by Ayala in outlining the attitude of Roman law to truants. "And inquiry is made into the circumstances of his truancy—why the man went away and whither and what he did there, and pardon may be given where the reason was his health or his affection for his relatives by blood or marriage or where he was in pursuit of a fugitive slave or there was some other such explanation."[22] There is no evidence to suggest that the Roman courts ever similarly considered the motives or intentions of a deserter.

This discrimination explains one odd feature of the 17th century Articles. Some of the embryonic articles on absence without leave incorporate an element of intention. The Swedish Articles of 1621[23] include the following article:

> 49. He that, when warning is given for the settling of the watch by sound of drumme, fife, or trumpet, shall wilfully absent himself without some lawful excuse; shall be punisht with the wooden horse, and be put to bread and water, or other pennance, as the matter is of importance.[24]

Similarly, Article 1 of the English Articles, issued between 1660 and 1700,[25] provided:

> All officers and soldiers (not having just impediment) shall diligently frequent Divine service and sermon in such places as shall be appointed for the Regiment, troop or company to which they belong, and such as either wilfully or negligently absent themselves from divine service or sermon, or else being present do behave themselves indecently or irreverently during the same, if they be officers they shall be severely reprimanded at a court martial; but if private soldiers they shall for every such first offence forfeit each man twelve pence to be deducted out of their next pay; and for the second offence shall forfeit twelve pence and be laid in irons for twelve hours; and for every like offence afterwards shall suffer and pay in like manner.[26]

It cannot be said that English military law did not recognize intention as a legal concept, and its omission from the statement of the offense of desertion must be regarded as deliberate. Indeed, the Articles of 1660–1700 specifically excluded intention and anyone found more than a mile from his quarters was automatically treated as a deserter.

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[21] Ayala, *op. cit. supra* note 17, at 214.
[22] *Ibid.*
[23] Winthrop, *op. cit. supra* note 11, at 910.
[24] *Ibid.*
[25] Walton, *op. cit. supra* note 9, at 808.
[26] *Ibid.*

The probable explanation for this was that, with the divided loyalties of the 17th century, the Roman approach to desertion was too lenient. When a whole regiment deserted, as occurred immediately before the first Mutiny Act, there was no place for absence without leave.

If this was the original approach to desertion, it was not long before courts-martial commenced to look at intention and ameliorate the rigorous approach of the Mutiny Act and Articles of War. An account of a court-martial held in 1708 to try eleven cases of desertion and two cases of murder indicates that while intention was relevant, the present criterion of an intention to remain away permanently had not then emerged.[27] The three most significant cases dealt with by the court were:

> William Cole, John Brown, Christopher Proctor, and James Mills of Major ____ Company in Major-General Howes' Regt, accused of deserting from the ship the Company was on Board at Shields in March last; they say for themselves they went ashore only to get some refreshment without any design to desert, and the sergeant saying he took them at a village a small distance from Shields in an Alehouse, where there were at the time several other soldiers, and that they did not offer to make any resistance or to go away, the court is unanimously of opinion that the said prisoners are not guilty of desertion, and that they be acquitted accordingly.
>
> John Muddey of Captain Ruthven's Company in the Royal Regt of Foot, accused of deserting from the camp at Terbanck, the 3rd instant. The prisoner owns he went from his post without leave, with intent only to visit an acquaintance of Major-General Murray's Regt., but was stopped in the way, and his officer affirming that he is a weak and silly man, and that this is his first fault, the court recommend him as a fit object of His Grace's mercy.
>
> Thomas Edwards of Captain Hesketh's Company in Colonel Godfrey's Regt accused of deserting from Shields in March last; he owns he went to Newcastle to see some of his countrymen, and the sergeant who was sent to fetch him, saying, the magistrate who secured the prisoner told him he owned he was a soldier, with the Regt and company to which he belonged, and that this is his first fault. The court is unanimously of opinion that the prisoner Thomas Edwards is guilty of the breach of the 23rd Article of War, but do humbly recommend him as a fit object of His Grace's mercy.[28]

It is clear that absence without leave had developed as a lesser offense by 1765 and may have developed earlier. A passage quoted in Clode may be a clue to this development.[29] It was the practice late in the 17th century to submit the sentences of courts-martial

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[27] 4 J. Army Historical Research Soc'y 161–166 (1925).
[28] *Ibid.*
[29] 2 Clode, Military Forces of the Crown 41 (1869).

to the King for his approval.[30] During the absence of King William III (William of Orange) in Holland, sentences were referred to Queen Mary whose womanly instincts must have led her to query whether so many death sentences were necessary. Col. Gibson in reply stated:

> My opinion is that the last example ought to have been sufficient for the deterring and keeping others in their duty; but God knows it has taken but little effect, for we have lost several men since; however, at the last court-martial I did recommend it to the members that they would consider the late example, and not run to the extremity of the law. I strove to persuade them that the running out of an open quarter was not so ill as out of a garrison, and that not so ill as running away before the enemy, and that the Act of Parliament (which is our rule) says "Death or such other punishment as the court martial shall think fit," and seeing the prisoner had not been above three months a soldier (and deserted before the Regt came hither) a corporal punishment, severely inflicted, might take place. All this would not help; all of them were for death. This was and is my opinion.[31]

III. SHORT DESERTION

It may be argued that if the early approach to desertion was based on Roman law, the test was a long period of absence and this necessarily excluded short desertion. However, Roman law recognized more than one form of desertion. In cases of desertion to the enemy, it is doubtful whether it was necessary to prove a long period of absence;[32] similarly, in cases of desertion from the watch.[33]

The point was made earlier that desertion absorbed a number of articles requiring a soldier to be at the right place at the right time. It is probable that desertion was used as a broad offense. There is clear evidence of its use to cover desertion to the forces of another country, again from the court martial held in 1708:[34]

> Samuel Cluse, of Captain Usher's Company in Major General Webb's Regt accused of deserting from the camp at Meldert last year. Captain Usher, above said, swears the prisoner was missing from the company at Meldert Camp last year; that as the Regt on its return from England marched through Bruges, he was in the Danish Guards; that the Danish Officer told him that when he listed the prisoner last winter in Germany, he disowned his ever having been in any other service, that he deserted formerly and was forgiven. Sergeant William Arskew of Captain Usher's Company swears the prisoner went from the company last year without leave, that he heard no more of him till the Regt came back from

[30] Walton, *op. cit. supra* note 9, at 549.
[31] 2 Clode, *op. cit. supra* note 29, at 41–42.
[32] Ayala, *op. cit. supra* note 17, at 218.
[33] *Id.* at 231.
[34] 4 J. Army Historical Research Soc'y 161–166 (1925).

England, that he deserted from the Camp at St. Tron in 1703 and was forgiven. Corporal John Mountain of the same company swears the same things. The prisoner says for himself he went for a straw, and was taken prisoner, that when the Regt came back through Bruges, he told the Danish Officer who had listed him that he formerly served in it, and desired to return to it. The court is unanimously of opinion that the prisoner Samuel Cluse is guilty of the breach of the 24th Article of War and sentenced him to suffer death for the same.[35]

A 17th century contemporary soldier who had quitted his unit with intent to shirk important service would have been most surprised if it had been put forward in his defense at his trial that he had not really deserted. Certainly the members of the Scottish Regiment whose mutiny led to the first Mutiny Act would have been most surprised. The Scottish Regiment was under orders to march to Harwich so that they would be ready to cross to the Continent.[36] Although the Regiment acted in concert and not as individuals, a fair description of their conduct would be that they quitted His Majesty's service with intent to shirk important service. The terms of the Mutiny Act would be hard to understand if the mutiny of the Scottish Regiment were not regarded as being also a collective desertion.

IV. COMMON LAW GLOSSES

On the one hand, it may be argued that Ansell's adoption of short desertion during World War I was an attempt to expand the scope of desertion through a common law development; on the other hand, it may also be argued that it was not an expansion but a return to the earlier concept of desertion.

There is a tendency in some American thinking on military law to regard the divining of Congressional intentions as reflected in the Uniform Code of 1950[37] and earlier codes as being of paramount importance, and to frown on common law developments. Military law, unlike civil law, has not been supported by a recognized common law. The importance of the unwritten military law has long been recognized by the authors of military text-books and notably by Winthrop; yet none were prepared to dignify it by calling it a common law and it is still known by its rather disreputable name, "the custom of the Service." The British Courts-Martial Appeals Court does not yet seem prepared to take the

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[35] *Ibid.*

[36] 3 Macaulay, *op. cit. supra* note 2, at 38–46.

[37] Act of May 5, 1950, § 1, ch. 169, 64 Stat. 108 (effective May 31, 1951). Reenacted in 1956 as 10 U.S.C. §§ 801–940. Act of August 10, 1956, § 1, ch. 1041, 70A Stat. 1, 36–79 (effective Jan. 1, 1957).

step. In *R. v. Durkin*[38] counsel for the Crown advanced the argument that there was a general power to dissolve courts-martial under the "common law of the services." The court accepted the argument that there was such a power but refrained from agreeing expressly that there was a common law of the services.

Some areas of military law are particularly well suited to a common law approach; in particular, the general article and disobedience of a lawful command. To anyone who is familiar with the historical development of the general article and of the immunity of the services from civil processes for the recovery of debts, the decision of the United States Court of Military Appeals in *United States v. Kirksey*[39] is a common law decision of the highest merit, and displays a sureness of judgment which is not always present in legislatures.[40]

Probably no one has been more influential in preventing the development of a military common law than Sir William Blackstone. In his Commentaries written in 1765 he echoed and developed the sentiments of the late 17th century, embodied in the first Mutiny Act, and stated: "For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, as Sir Matthew Hale observes, is, in truth and reality no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the Queen's courts are open for all persons to receive justice according to the laws of the land."[41] Standing armies in time of peace are now a military necessity and a separate system of military law has evolved. Given these things, it is doubtful whether Blackstone would have accepted the proposition that the settled principles of military law are predominantly a matter for an omniscient legislature. For Blackstone, the English common law was "the best birthright and noblest inheritance of mankind."[42]

Desertion has been defined by statute in America, Canada and England since World War II. It may be pertinent to reflect whether a statutory definition would have been necessary if military lawyers in World War I and II had appreciated the possi-

[38] 37 Crim. App. R. 127, 3 All E. R. 685 (1953).
[39] 6 USCMA 556, 20 CMR 272 (1955).
[40] For a comparative legislative approach to the problem of debts, see Report of Select Comm. on Army Act and Air Force Act, House of Commons, at 14 (1954).
[41] 1 Blackstone, Commentaries 412 (13th ed. 1800).
[42] O'Sullivan, The Inheritance of the Common Law 3 (1950).

bilities of military legal history. A common law can best operate when it is enshrined in law reports and is founded on legal history.

V. CONCLUSION

There is some evidence to support the following conclusions. Desertion emerged, as a military offense, prior to absence without leave. The intention of a deserter was not originally relevant. When it did become relevant, it was not limited initially to the intention to remain away permanently. Short desertion is consistent with the earlier concept of desertion and may not be a modern common law gloss.

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AGO 6787B

ARTICLE 123(a): A BAD CHECK OFFENSE FOR THE MILITARY.* After years of unsuccessful attempts,[1] the Uniform Code of Military Justice[2] was finally amended in the 87th Congress last year to provide specific statutory authority for the prosecution of bad check offenses.[3] This legislation, which had been recommended for passage every year since the enactment of the Code,[4] with little or no subsequent congressional action, was whisked through the legislative process with comparative ease in the past session of Congress.[5]

Although the lack of this statutory authority has been widely criticized,[6] it still remains to be seen whether the new bad check offense is the complete solution which its supporters claim it to be. It is submitted that there are still areas which are in need of interpretation and that such interpretation will, of necessity, be supplied through decisions of the United States Court of Military Appeals.[7]

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* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency. [*Editor's Note:* It is intended that this comment serve as a supplement to the article on this same subject appearing in the October, 1961, *Military Law Review*. Simon, *A Survey of Worthless Check Offenses*, Mil. L. Rev., October 1961, p. 29.]

[1] Two bills containing sections identical to Pub. L. 87–385, 87th Cong., 1st Sess. (1961) were first introduced in Congress in 1955. S. 2133 and H.R. 6583, 84th Cong., 1st Sess. (1955). Similar bills were introduced in every session of Congress thereafter.

[2] Act of May 5, 1950, § 1, ch. 169, 64 Stat. 108 (effective May 31, 1951). Re-enacted in 1956 as 10 U.S.C. §§ 801–940 (1958). Act of Aug. 10, 1956, § 1, ch. 1041, 70A Stat. 1, 36–79 (effective Jan. 1, 1957) (hereinafter referred to as the Code and cited as UCMJ, art.).

[3] Act of Oct. 4, 1961, Pub. L. 87–385, 75 Stat. 814, 10 U.S.C. § 923(a), UCMJ, art. 123(a). See note 25 *infra* for the text of the new act.

[4] The legislation was first recommended in the First Annual Report of the U. S. Court of Military Appeals and The Judge Advocates General of The Armed Forces and The General Counsel of the Department of the Treasury pursuant to the Uniform Code of Military Justice for the period May 31, 1951, to May 31, 1952 (hereinafter cited as USCMA and TJAG Ann. Rep.), and the recommendation has been repeated in each subsequent annual report.

[5] H.R. 7657, 87th Cong., 1st Sess. (1961), was introduced by Rep. Carl Vinson (D–Ga.), Chairman of the House Armed Services Committee, in June 1961. It was reported out of the House Armed Services Committee without amendment and was passed by the House on July 10, 1961. It was then referred to the Senate Armed Services Committee, which reported it out favorably without amendment on August 3, 1961. The bill was passed by the Senate on September 20, 1961, and was signed into law by the President on October 4, 1961. It became effective on March 1, 1962.

[6] See Simon, *A Survey of Worthless Check Offenses*, Mil. L. Rev., October 1961, p. 29, 59.

[7] See UCMJ, art. 67, which establishes a United States Court of Military Appeals, hereinafter referred to as the Court of Military Appeals.

The purpose of this comment is to examine briefly the legislative background of the new statute, the scope of the offense, and some of the problems which will be encountered under the new legislation. Where pertinent, a brief analysis of the recent amendments and changes[8] to the Manual for Courts-Martial[9] implementing this statute will also be included.

I. LEGISLATIVE BACKGROUND

Early in 1952, less than a year after the Code became operative, various committees[10] were set up to consider and recommend changes in the Code. All of these committees recommended that a new punitive article should be passed incorporating provisions similar to the District of Columbia bad check statute.[11] Every year since then these recommendations have been repeated.[12]

The reason set forth in behalf of such an amendment was that the services were experiencing difficulty in prosecuting bad check offenses because of a lack of guideposts as to proper specifications, proof, and instructions.[13] This system was said to result in "divergent standards of proof" among the several services.[14]

Accordingly, in 1955, a bill sponsored by the Department of Defense, containing the proposed new bad check legislation as well as 16 other recommended changes to the Code, was first introduced into Congress.[15] This group of proposed amendments, later known as the Omnibus Bill,[16] was introduced in every session of Congress thereafter, but never met with success. In 1959, the Secretary of the Army appointed an ad hoc committee to study the Uniform

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[8] Exec. Order No. 11009, 27 Fed. Reg. 2585 (1962). See U. S. Dep't of Army, Pamphlet No. 27-101-96 (1962) (Judge Advocate Legal Service), for the text of the twelve amendments to the Manual and sample instructions for the new offenses.

[9] U. S. Dep't of Defense, Manual for Courts-Martial, United States, 1951 (hereinafter referred to as the Manual and cited as MCM, 1951, para.).

[10] Three committees are important. One, the Code Committee, composed of the Judges of the Court of Military Appeals, the Judge Advocates General of the three services, and the General Counsel of the Department of the Treasury, was created by UCMJ, art. 67(g). A Service Committee, composed of military personnel from the Army, Navy, Air Force, and Coast Guard, was appointed by the service Judge Advocates General and the General Counsel of the Treasury. Finally, a Court Committee, composed of civilian attorneys, was appointed by the Court of Military Appeals. See 1952-1953 USCMA and TJAG Ann. Rep. 3-4.

[11] 1952-1953 USCMA and TJAG Ann. Rep. 9.

[12] See USCMA and TJAG Ann. Rep. for the years 1954-1960.

[13] 1952-1953 USCMA and TJAG Ann. Rep. 9.

[14] *Ibid.*

[15] S. 2133, H.R. 6583, 84th Cong., 1st Sess. (1955).

[16] H.R. 3387, 86th Cong., 1st Sess. (1959).

Code of Military Justice and its effectiveness in maintaining good order and discipline in the Army. After an exhaustive study of numerous problems, the report of that committee also recommended the adoption of bad check legislation identical to that proposed in the Omnibus Amendments.[17] In supporting the new statute, this committee pointed to the technical difficulties of pleading under the existing system and the lack of a presumption relative to the intent to defraud.[18]

Because of differences between the services over the various proposals contained in the Ad Hoc Committee Report, the services agreed to concentrate on three legislative proposals.[19] One of these proposals was the bill which, upon enactment, became Article 123(a) of the Code. The bill was introduced in the 87th Congress in June 1961 and, despite the customary legislative bottlenecks, was speedily acted upon and passed by both houses of the Congress.[20] Little or no debate was encountered on the floor of Congress.[21] The committee reports[22] were brief and not very illuminating.

The explanation of the bill, as contained in the Senate Report,[23] pointed out the absence of specific statutory authority under the Code for prosecution of bad check offenses and the resulting difficulties of prosecution under Articles 121, 133, and 134, as interpreted by decisions of the Court of Military Appeals. Particular attention was directed to the element of intent to defraud or deceive under the new legislation and the effect of the presumption created by the statute. As in all previous bills, it was emphasized that the new statute is identical to that currently in existence in the District of Columbia, Missouri, and New York.[24]

II. SCOPE OF THE NEW STATUTE

Article 123(a) of the Code prohibits the making, drawing, uttering or delivering of a check, draft, or order, for any purpose,

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[17] U. S. Dep't of Army, Report of The Committee on The Uniform Code of Military Justice, Good Order and Discipline in the Army 178 (1960) (hereinafter referred to as the Ad Hoc Committee Report).

[18] *Ibid.*

[19] JAGJ 1961/8291 (June 12, 1961), in U. S. Dep't of Army, Pamphlet No. 27–101–74, pp. 5–6 (1961) (Judge Advocate Legal Service).

[20] See note 5 *supra.*

[21] 107 Cong. Rec. 11316–17, D546 (daily ed. July 10, 1961); 107 Cong. Rec. 19195, D879 (daily ed. September 20, 1961).

[22] S. Rep. No. 659, H.R. Rep. No. 583, 87th Cong., 1st Sess. (1961). The Senate Report is set out in 1961 U. S. Code Cong. & Ad. News 5001.

[23] S. Rep. No. 659, *supra* note 22.

[24] D.C. Code § 22–1410 (1951); Vernon's Ann. Mo. Stat. §§ 561.460, 561.470, 561.480 (1953); N.Y. Penal Law § 1292–a (1944).

with knowledge that there are insufficient funds for the payment thereof and with intent to defraud or deceive the payee thereof.[25]

Thus, it will be seen that there are four important elements of proof involved in a prosecution for the offense. Initially, there must be proof of the issuance of the instrument in question and its subsequent dishonor. Secondly, there must be proof that the instrument issued is one of the instruments enumerated in the statute. Thirdly, there must be proof of the maker's knowledge of insufficient funds. Finally, there must be proof that the maker issued the instrument for the procurement of any article or thing of value, with intent to defraud, or, for any reason, with intent to deceive.

Certain difficulties face the prosecutor in proving all of these elements.

A. *PROOF OF ISSUANCE, DISHONOR AND TYPE OF INSTRUMENT*

In the normal situation, it should not be too difficult to prove that a particular instrument has been drawn and subsequently dishonored. Testimony of the appropriate bank official and the payee will be sufficient in a majority of the cases.[26] The new provisions incorporated into the Manual will make this task more simplified. Paragraph 143*a*(2) has been amended to make admissible duly authenticated copies of banking entries, including

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[25] The text of the statute is as follows: "Any person subject to this chapter who—

"(1) for the procurement of any article or thing of value, with intent to defraud; or

"(2) for the payment of any past due obligation, or for any other purpose, with intent to deceive; makes, draws, utters, or delivers any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time that the maker or drawer has not or will not have sufficient funds in, or credit with, the bank or other depository for the payment of that check, draft, or order in full upon its presentment, shall be punished as a court-martial may direct. The making, drawing, uttering, or delivering by a maker or drawer of a check, draft, or order, payment of which is refused by the drawee because of insufficient funds of the maker or drawer in the drawee's possession or control, is prima facie evidence of his intent to defraud or deceive and of his knowledge of insufficient funds in, or credit with, that bank or other depository, unless the maker or drawer pays the holder the amount due within five days after receiving notice, orally or in writing, that the check, draft, or order was not paid on presentment. In this section, the word 'credit' means an arrangement or understanding, express or implied, with the bank or other depository for the payment of that check, draft, or order. . . ."

[26] See Simon, *supra* note 6, at p. 60.

written "translations" of mechanical or electronic entries.[27] Paragraph 143*b*(3) has been amended to permit a simplified method of authenticating banking entries.[28]

An important aid in proving dishonor has been added in paragraph 144*c* of the Manual. This section allows the admission of a bank's notation on a returned check, if properly authenticated, as evidence that the payment of the instrument was refused for the reasons indicated on the notation, under the business entry exception to the hearsay rule.[29]

It is also important to note that under the amended version of paragraph 143*a*(2) of the Manual, it is possible to show that there are no entries or records of a banking transaction, either through the testimony of a bank official to that effect or by a duly authenticated statement by the responsible person to that effect. Such proof may be received as evidence that such a transaction did not take place.[30]

A particular problem in this area is the question of what is a "check, draft, or order" within the meaning of this statute. For example, there is a divergence of opinion as to whether a postdated check falls within the prohibition of this statute. The more recent cases take the view that they do not:[31]

> It will be seen that section 1292–a [New York Penal Law] does not recite postdated checks among the prohibited items. . . . Section 321 of the Negotiable Instruments Law defines a "check" to be a bill of exchange drawn on a bank payable on demand. . . . [T]he instrument in question was not a check within the meaning of section 321, and to issue it under the conditions described in the act does not, therefore, constitute a crime [under this statute]. . . . Fraud cannot be predicated upon nonperformance of a future promise, and a postdated check is a mere promise to discharge a present obligation at a future date.[32]

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[27] Exec. Order No. 11009, 27 Fed. Reg. 2585 (1962), also set out in U. S. Dep't of Army, Pamphlet No. 27–101–96, pp. 9–10 (1962) (Judge Advocate Legal Service).

[28] *Id.* at pp. 11–12.

[29] *Id.* at pp. 13–14.

[30] *Id.* at pp. 9–10.

[31] State v. Brookshire, 329 S.W.2d 252 (Mo. App. 1959); People v. Mazeloff, 229 App. Div. 451, 242 N.Y.S. 623 (1930); Azzarello v. Richards, 99 N.Y.S.2d 597 (Syracuse Munic. Ct. 1950). *Contra*, State v. Taylor, 335 Mo. 460, 73 S.W.2d 378 (1934).

[32] People v. Mazeloff, 242 N.Y.S. 623, 624–25 (App. Div. 1930). In *Brookshire, supra* note 31, the Missouri Court of Appeals held that, in the case of a postdated check, it was necessary to show that the drawer had a fraudulent intent "with reference to the promise or assurance of future action . . . and not with reference to the failure to keep the promise." 329 S.W.2d at 356. This legal distinction is not clear, especially in view of the posture of the evidence in the case, which indicated that at no time after the check was given were there sufficient funds in the defendant's account to cover the check. Furthermore, no evidence was offered by the defendant in his behalf.

One of the recent amendments to the Manual[33] purports to cover this situation:

> The check, draft, or order, whether made or negotiated for the procurement of an article or thing of value or for the payment of a past due obligation or for some other purpose, need not be intended or represented as payable immediately. For example, the making of a postdated check, delivered at the time of entering into an installment purchase contract and intended as payment for a future installment, would, if made with the requisite intent and knowledge, be a violation of this article.

Yet, in both New York and Missouri, courts interpreting statutes identical to Article 123 (a) have held that such an instrument does not fall within the purview of the statute.[34]

Whether the Court of Military Appeals will give effect to such an argument, instead of supporting the language of the Manual, is questionable. In *United States v. Cummins*,[35] the Court, considering the effect of a postdated check in a prosecution under Article 121 for false pretenses, held that if the offense was otherwise established, the fact that the check used was postdated did not constitute grounds for reversal. This position has recently been reaffirmed by the Court in *United States v. Cully*,[36] in which it was held that a false statement of a present intention to repay a loan is a statement of an existing fact necessary to support a prosecution for false pretenses under Article 121.

Another line of cases concerns the effect of a conditional check. The New York courts have apparently equated this situation to that of a postdated check, although speaking in terms of lack of fraudulent intent.

In *People v. Kapitofsky*,[37] the defendant testified that there was an express understanding between him and the payee that the check was not to be deposited for ten days. The complainant, however, deposited the check after five days and it was dishonored. There was corroborating evidence of the conditional nature of the check. The court dismissed the charge for lack of proof of fraudulent intent.

In *People v. Nibur*,[38] the defendant delivered a check in the amount of $175 to the payee in settlement of a pre-existing debt

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[33] MCM, 1951, para. 200*a*, Exec. Order No. 11009, 27 Fed. Reg. 2585 (1962), also set out in U. S. Dep't of Army, Pamphlet No. 27-101-96, p. 18 (1962) (Judge Advocate Legal Service).

[34] See note 31 *supra*.

[35] 9 USCMA 669, 26 CMR 449 (1958). Judge Ferguson dissented.

[36] 12 USCMA 704, 31 CMR 290 (1962).

[37] 144 Misc. 543, 258 N.Y.S. 861 (N.Y. City Magis. Ct. 1932).

[38] 238 App. Div. 233, 264 N.Y.S. 148 (1933).

of $280. The defendant testified that it was agreed that the check would be held by the payee until he was notified by the defendant that there were sufficient funds to cover the check. The payee denied this arrangement, but the court, in reversing the conviction, stressed (1) the fact that the defendant's version of the story was corroborated and (2) the independent evidence of defendant's efforts to collect certain debts due him from other persons for the purpose of covering the check involved.

Finally, in *People v. Will*,[39] the New York Court of Appeals reversed a conviction for issuing worthless checks and grand larceny in the second degree where competent evidence was introduced indicating that the payee, with knowledge that there were insufficient funds, agreed to hold the defendant's check for 30 days.

In all of these cases the emphasis has been on the conditional nature of the transaction, which has resulted in a lack of proof of the fraudulent intent necessary to sustain a conviction. However, this result can also be expressed in terms of failure of proof that the instrument in question was a "check, draft, or order" within the meaning of the statute.

B. *PROOF OF KNOWLEDGE OF INSUFFICIENCY*

A more difficult problem concerns proof of the maker's knowledge of insufficiency of his account. The statute requires that the maker know, at the time the instrument is drawn, that he has not, or will not have at the time of presentment, sufficient funds on deposit for the payment of the instrument.[40] However, as with the element of intent to defraud or deceive, the statute creates a presumption relative to this element. This presumption provides that the non-payment of the instrument because of insufficient funds is *prima facie* evidence of the drawer's knowledge of insufficient funds, unless the instrument is redeemed within five days after notice of dishonor.[41]

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[39] 289 N.Y. 413, 46 N.E.2d 498 (1943), *reversing* 34 N.Y.S.2d 147 (App. Div. 1942).

[40] The pertinent language of the statute is: "Any person subject to this chapter who . . . makes, draws, utters, or delivers any check, draft, or order . . . *knowing at the time* that the maker or drawer *has not* or *will not have* sufficient funds in, or credit with, the bank or other depository for the payment of that check, draft, or order in full *upon its presentment*, shall be punished as a court-martial may direct" (emphasis added).

[41] See Exec. Order No. 11009, 27 Fed. Reg. 2585 (1962), as set out in U. S. Dep't of Army, Pamphlet No. 27-101-96, pp. 19-20 (1962) (Judge Advocate Legal Service), for the Manual amendment implementing this concept.

It is clear that this presumption is not conclusive and can be overcome by evidence to the contrary.[42] However, the amount and type of evidence to the contrary may vary from case to case, depending upon a court's interpretation.

Thus, in *People v. Hasto*,[43] it was held that the presumption of knowledge of insufficiency had been successfully rebutted where the defendant introduced evidence of his attempts to deposit money to cover the check involved.

Likewise, under both the Missouri and New York statutes, it has been held that a conviction for this offense cannot stand where evidence has been introduced to show that, at different times between the time of delivery of the check and the time of its presentment, there were sufficient funds in the account to cover payment.[44]

Other cases have indicated that the defendant, in order to rebut the presumption, may introduce evidence of sufficient funds *at the time the check was drawn*, of lack of knowledge that his account was overdrawn, or of the fact that he had sufficient credit at the bank to warrant the bona fide belief that the check would be honored by way of overdraft.[45]

It has also been held that evidence of disclosure by the drawer to the payee of insufficiency of funds at the time the instrument is made rebuts the criminal intent required and turns the transaction into an extension of credit.[46]

These decisions point up one of the areas in which the language of the statue is not entirely clear. It is not specifically stated

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[42] People v. Will, 289 N.Y. 413, 46 N.E.2d. 498 (1943), *reversing* 34 N.Y.S.2d 147 (App. Div. 1942); People v. Nibur, 238 App. Div. 233, 264 N.Y.S. 148 (1933).

[43] 260 N.Y.S. 97 (App. Div. 1932). See text accompanying note 58 *infra* for a more detailed statement of the facts in this case.

[44] State v. Humphrey, 74 S.W.2d 86 (Mo. App. 1934); People v. Weiss, 263 N.Y. 537, 189 N.E. 686 (1933), *reversing* 256 N.Y.S. 959 (App. Div. 1932). In People v. Ledwell, 14 N.Y.S.2d 371 (Chenango County Ct. 1939), the court distinguished *Weiss, supra*, on the facts, but did hold that it was not necessary under the statute to allege in the indictment that the defendant did not, at any time after delivery of an instrument, have sufficient funds for the payment thereof.

[45] Elliott v. Caheen Bros., 153 So. 613 (Ala. 1934); Annot., 95 A.L.R. 486, 491 (1935).

[46] Annot., 95 A.L.R. 486, 494 (1935). *Compare* Re Griffin, 83 Cal. App. 779, 257 Pac. 458 (1927) *with* People v. Kapitofsky, 144 Misc. 543, 258 N.Y.S. 861 (N.Y. City Magis. Ct. 1932). See also Hughes v. Comm'n, 230 Ky. 37, 18 S.W.2d 880 (1929). This principle has also been extended to the situation where the payee has personal knowledge of the insufficiency, in which case such knowledge has been equated to express notice. Seaboard Oil Co. v. Cunningham, 51 F.2d 321 (5th Cir. 1931), *cert. denied*, 284 U.S. 657 (1931).

whether knowledge of insufficiency must exist at the time of the drawing of the check or other instrument or at the time of its presentation for payment. Paragraph 202*a* of the Manual, in discussing this element,[47] seems to imply that accused must possess, *at the time the instrument is drawn,* the knowledge that there are, or will be, insufficient funds for payment of the instrument in full upon its presentment. If the instrument is drawn on a non-existent bank, knowledge is, of course, presumed. In at least one case commenting upon this problem, it was stated that the *test of sufficiency was to be made as of the time of the check's presentation for payment.*[48] Accordingly, under this theory, even though the maker might have sufficient funds at the time of the drawing or delivery of the check, if the funds are subsequently depleted so that they are insufficient when the instrument is presented for payment, then the drawer may be properly convicted under the statute.[49] It appears that the drafters of the Manual amendments intended that the same result be reached under the Manual amendments.

The civilian courts have, for the most part, restricted the operation and effect of the presumption of knowledge of insufficiency, and, in so doing, have restricted the application of the statute as a whole. While such an interpretation seems to violate the legislative intent and certainly would violate the intent of the services which recommended the passage of this legislation, the language of the statute does not seem to prohibit such an interpretation. This deficiency becomes even more apparent in examining the fourth element of the new offense.

C. *PROOF OF INTENT TO DECEIVE OR DEFRAUD*

In proving the element of fraudulent intent,[50] the prosecutor may again rely on the statutory presumption to get his case to the jury. However, it is clear that the prosecution should not rely on the presumption alone to establish fraudulent intent, should the defendant be able to present evidence which, if believed by the court-martial, would rebut the presumption or inference of fraudulent intent.

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[47] See Exec. Order No. 11009, 27 Fed. Reg. 2585 (1962), in U. S. Dep't of Army, Pamphlet No. 27–101–96, pp. 19–20 (1962) (Judge Advocate Legal Service).

[48] State v. Taylor, 335 Mo. 460, 73 S.W.2d 378 (1934) (dictum).

[49] *Ibid.* See Annot., 95 A.L.R. 486, 493-94 (1935).

[50] The language of the statute refers to the "intent to defraud" or "intent to deceive." References in the text to "fraudulent intent" are designed to cover both of these more specific terms.

The cases have repeated innumerable times the proposition that a fraudulent intent is an essential element of the crime,[51] that it must be alleged in the indictment or information,[52] that the prosecution has the burden of establishing the fraudulent intent,[53] and that the mere issuance of a check without sufficient funds will not support a conviction under this type of statute without proof of an intent to deceive or defraud.[54]

In considering the purpose and effect of the statutory presumption, the Missouri Court of Appeals has stated:

> This statue has obviated the duty of the State to directly prove the intent and knowledge. The State having shown that the defendant did not pay the check within five days after notice of dishonor, has met the burden of proving the required intent and knowledge. . . .[55]

However, although the reported decisions have given homage to the proposition that the presumption is not rebutted unless there has been "substantial evidence to the contrary,"[56] it appears that something less than "substantial evidence" has been required. Certain types of evidence seemingly rebut the presumption as a matter of law.

In *People v. Humphries*,[57] it was held that the presumption had been rebutted, apparently as a matter of law, where there was evidence that defendant's check was not honored solely because a stop payment order had been placed on another check he had deposited to cover the amount involved.

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[51] People v. Will, 289 N.Y. 413, 46 N.E.2d 498 (1943), *reversing* 34 N.Y.S.2d 147 (App. Div. 1942); People v. Miller, 89 N.Y.S.2d 790 (Madison County Ct. 1949); People v. Siman, 199 Misc. 635, 197 N.Y.S. 713 (Montgomery County Ct. 1922).

[52] People v. Miller, *supra* note 51, where it was held that omission of such an allegation was a jurisdictional defect which could not be waived by a guilty plea. It is generally held that an indictment alleging the offense in the words or language of the statute is sufficient. State v. Kaufman, 308 S.W.2d 333 (Mo. App. 1957); People v. Siman, *supra* note 51. Accordingly, military charges and specifications drawn in such a manner should not prove to be erroneous.

[53] People v. Will, *supra* note 51; People v. Nibur, 238 App. Div. 233, 264 N.Y.S. 148 (1933).

[54] People v. Humphries, 234 N.Y.S. 688 (App. Div. 1929). The New York Court of Appeals has even held that it is error to *refuse to instruct* that mere issuance of a check when there are insufficient funds *does not* violate the law *unless* done with an intent to defraud. People v. Will, *supra* note 51. However, the trial judge in the case, in commenting on his refusal to grant the requested instruction, stated that it did not agree with the language of the statute.

[55] State v. Kaufman, 308 S.W.2d 333, 339 (Mo. App. 1957).

[56] People v. Will, *supra* note 51, at 414, 46 N.E.2d at 499; *In re* Magna, 258 N.Y. 82, 84, 179 N.E. 266, 267 (1932); Potts v. Pardee, 220 N.Y. 431, 433, 116 N.E. 78, 79 (1917).

[57] 234 N.Y.S. 688 (App. Div. 1929).

In *People v. Hasto*,[58] the defendant admitted that there were insufficient funds when he delivered the check. However, he offered evidence that the same afternoon he unsuccessfully attempted to deposit a cashier's check in his account to cover the one he had written. A bank cashier verified this story. There was also evidence that the defendant then deposited the cashier's check in another bank and that he offered to exchange the check held by the payee for one drawn on the second bank. The payee refused this offer. On the basis of these facts, a conviction under the statute was reversed and the information was dismissed, on the grounds that the presumpton of fraudulent intent has been successfully rebutted.[59] It was also held that testimony of an official of the second bank, offered to corroborate the defendant's statements, was erroneously excluded.[60]

Proof that the notice of dishonor referred to in the statute was given is not an essential element of the crime.[61] Failure to give such a notice would only prevent the prosecution from availing itself of the presumption created by the statute.[62]

Where the defendant attempts to show lack of fraudulent intent by proof that his bank had honored previous overdrafts, the courts have been reluctant to say that such evidence alone is an indication of an arrangement or an understanding with the bank for the payment of any and all checks.[63] Proof of a formal arrangement of this type, however, will be a defense.[64]

Finally, there is the question of the effect of redemption by the defendant. Generally, it is held that redemption within the five-day period is not a defense to the offense.[65] It merely serves to abrogate the presumption created by the statute.[66]

The strict treatment accorded this element of the offense and the proof thereof may present some real problems to the military. As it has been pointed out,[67] this *statute* provides no punishment for making and uttering a worthless check without an intent to

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[58] 260 N.Y.S. 97 (App. Div. 1932).
[59] *Id.* at 100.
[60] *Ibid.*
[61] State v. Kaufman, 308 S.W.2d 333, 338 (Mo. App. 1957).
[62] *Ibid.* This case also indicated that even where notice of dishonor is given, it need not be in writing.
[63] State v. Kaufman, *supra* note 61, at 339.
[64] Annot., 95 A.L.R. 486, 491 (1935).
[65] State v. Kaufman, *supra* note 61, at 338.
[66] *Ibid.* See Gunther v. State, 42 Okla. Crim. 129, 276 Pac. 237 (1929).
[67] Simon, *A Survey of Worthless Check Offenses*, Mil. L. Rev., October 1961, p. 29, 62.

deceive and thereafter wrongfully and dishonorably failing to maintain a sufficient balance, an offense previously punished under Article 134 of the Code and known as the "minor check" offense.[68] Nevertheless, a form specification and punishment for such an offense is included under Article 134 in the recent amendments to the Manual.[69] By way of explanation, it is stated that this specification may be used to allege, in appropriate cases, a lesser included offense of one of the offenses covered in Article 123(a). It is stated that this offense is "characterized by mere dishonorable failure to maintain funds alleged as a simple disorder under article 134, as distinguished from an offense involving criminal intent to defraud or deceive."[70] Presumably there exist many situations in which no fraudulent intent is evident, but in which there is clearly a dishonorable failure to maintain sufficient funds.

The legislative history of the new law offers no assistance in this regard. It emphasizes the need for proof of a fraudulent intent as a prerequisite for conviction.[71] The following language from the Senate Report is pertinent:

> Mere error on the part of the drawee bank or the drawer that does not amount to *bad faith or gross indifference* will not fall within the proscription of the new article. . . .
>
> The committee was informed that the authority of this bill will not be used as an instrument to enforce collection of unpaid checks, but that *it will be used solely for the prosecution of offenders whose misconduct falls within the terms of the article. . . .*[72]

Thus, albeit unwittingly, the legislative history seems to read out of the proscription of the statute any conduct formerly prosecuted as a minor check offense and reads back into the statute the

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[68] Under the pre-Article 123(a) practice, two types of worthless check offenses were being prosecuted under the general article, Article 134. The first, making and uttering a worthless check with intent to deceive and thereafter wrongfully and dishonorably failing to maintain a sufficient balance, was punishable by dishonorable discharge, total forfeitures, and confinement at hard labor for six months. The second offense, making and uttering a worthless check without intent to deceive and thereafter wrongfully and dishonorably failing to maintain a sufficient balance, was punishable by confinement and partial forfeitures for four months. These two offenses became known as the "major" and "minor" check offenses. See Simon, *supra* note 67, at p. 46.

[69] See Exec. Order No. 11009, 27 Fed. Reg. 2585 (1962), set out in U. S. Dep't of Army, Pamphlet No. 27-101-96, p. 25 (1962) (Judge Advocate Legal Service). This specification is almost identical to the specification utilized previously for prosecuting the "minor check" offense.

[70] Letter from Secretary, Dep't of Air Force, to Director, Bureau of Budget, in U. S. Dep't of Army, Pamphlet No. 27-101-92, p. 7 (1962) (Judge Advocate Legal Service).

[71] S. Rep. No. 659, 87th Cong., 1st Sess. (1961).

[72] *Ibid* (emphasis added).

importance of an accused's post-issuance conduct in establishing fraudulent intent, bad faith or gross indifference. The Senate Report had earlier indicated that one of the primary difficulties under the old system of prosecuting bad check offenses was the requirement for proof of dishonorable post-issuance conduct! Nevertheless, this type of evidence may still be necessary in order to clearly establish the accused's fraudulent intent, or wrongful or dishonorable conduct, as the case may be.

III. CONCLUSION

The difficulties of prosecuting worthless check offenses under the pre-Article 123(a) procedure were numerous, but it is still questionable whether Article 123(a) has supplied all of the remedies necessary. It appears that there are two difficult problems still involved in prosecuting worthless check offenses under Article 123(a). First, use of the statutory presumption and the simplified methods of evidentiary proof supplied by the recent Manual amendments will tend to lull the prosecution into a false sense of security in proving the elements of the offense. And, secondly, the construction to be placed on such terms as "check, draft, or order," "knowledge of insufficiency," and "fraudulent intent" is still unknown.[73] Unless military prosecutors take both of these factors into account when proceeding under this statute, the results may not be in accord with what the drafters intended.

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[73] It is true that the amendments to the Manual have attempted to supply some of the answers to these questions, but when state courts, interpreting identical statutes, have reached conclusions contrary to those reached in the Manual, it seems somewhat hazardous to rely completely on the Manual interpretation.

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BOOK REVIEW

Immigration Law and Practice. By Jack Wasserman. Philadelphia: Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association, 1961. Pp. xxi, 180. $4.00.

Helpful handbooks for the uninitiated practitioner in specialized fields of law, where the assumption of the reader's basic familiarity with the procedural and substantive framework cannot be made, are very difficult to produce. Their authors labor under severe hardships in achieving that balance which results in optimum utility. The handbook must provide comprehensive, easily understood coverage without either being purile or engulfed in a morass of detail. It must reflect current statute law (sometimes not yet judicially interpreted) without completely sacrificing discussion of the body of law, statutory and decisional, upon which recent changes are based. Above all, handbook authors must write clearly—with a simplicity and a lucidity designed to introduce the conundrums of their specialty and to suggest methods of handling them—while making maximum use of the limited space available to them.

A handbook which succeeds in its purpose is a signal addition to the working tools of the practitioner. Its author has performed an invaluable service to the bar in providing a slim volume whose use almost inevitably leads to more informed legal service to the public from a practitioner whose research facilities and available time may be limited. The compass of the law as we know it and apply it today is too broad to entertain reasonably the expectation that the ordinary practitioner will be familiar with the precedents and procedures of specialized areas into which he is seldom called upon to venture. A well drawn handbook provides answers to the practitioner's commonplace problems and the basis for further research into his difficult ones.

Although many aspects of general and specialized practice had been the subjects of handbooks, immigration law had never received such treatment.[1] A volume, sponsored by the Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association, of great value to the neophyte immigration practitioner, has now become available.

[1] Until 1959, immigration law had never been the subject of an exhaustive treatise. This void was excellently filled by Gordon & Rosenfield, Immigration Law and Procedure (1959) [hereinafter cited as Gordon & Rosenfield].

Mr. Jack Wasserman, a leading attorney in the field, has prepared an extremely useful, up-to-date and knowledgeable handbook, *Immigration Law and Practice.*

The contents of this handbook somewhat belie its title, in that the author uses the term "immigation law" in a broad, comprehensive way rather than in its ordinary, stricter sense. That which is commonly known as "immigration law" encompasses three distinct legal areas: the law of immigration, the law of nationality and the law of naturalization. There are, admittedly, many related problems—usually, however, thought of in their separate contexts—such as the rights and disabilities of aliens, the federal taxation of aliens and the effect of their presence in the United States upon their obligation to undergo U.S. military training. Mr. Wasserman's handbook covers both the primary and the related areas.

Certain definitional distinctions should be drawn among the subject matters covered by Mr. Wasserman's umbrella of "immigration law" before any attempt is made to evaluate the usefulness and quality of his coverage of them. It is an oversimplification, but a nonetheless correct postulate, that *all* of the subject matters arising in this broad area partake of a State's territorial sovereignty. As the supreme power within its territorial boundaries, a State may exercise the right to control the admission of aliens to its territory, to control their activities while within its territory and to prescribe the standards which aliens must meet in order to remain within its territory. Strictly speaking, the body of rules which are the operational manifestations of the exercise of these rights by a State constitute the law of immigation. The right of a State to define which persons will originally (that is, at birth) acquire its nationality is another aspect of territorial sovereignty, the rules of which make up the law of nationality. Finally, the exercise of the sovereign right to determine who may derivatively acquire the nationality of a State, and under what terms and conditions that nationality may be obtained and retained, constitute the law of naturalization. Any rights granted to and disabilities or obligations imposed upon aliens are functions of the right of a State to control the activities of aliens within its territorial boundaries.

Mr. Wasserman concerns himself primarily with the law of immigration. And, in that area, he succeeds very substantially in achieving the requisite balance of thoroughness, clarity and detail. He begins his *tour de force* of the immgration laws with a well written discussion of the roles played by the various State

and Justice Department agencies in the enforcement of those laws (Chapter II).[2] This discussion and a cursory history of the legislative development of the immigration laws are all the beginner is given to set the stage for the highly complex administrative and statutory pattern which follows.

Questions of all kinds may inhere in an immigration law problem—questions of administrative or constitutional law; of the interests of national security; of federal jurisdiction or practice; of domestic relations laws; or of criminal law, be it federal, state or of a foreign country. Many of these areas may, in themselves, be unfamiliar to the practitioner. That is all the more reason, this writer believes, that something more by way of introductory material is needed to assist the reader into the specialized milieu. Mr. Wasserman might have, with great profit, devoted a few pages to establishing the connection of questions inherent in individual immigration problems with their over-all context.

Although his treatment of the individual phases of immigration law is quite good, Mr. Wasserman fails to give the reader an over-all view of their internal structure to assist in studying them. The immigration laws[3] require an alien[4] seeking to enter the United States for any purpose to obtain permission to enter before departing for our borders. Every alien seeking entry is classified either as an "immigrant" or a "nonimmigrant." All aliens seeking entry are assumed to be "immigrants" (that is, generally speaking, persons seeking to enter the United States for permanent residence). It is incumbent upon the alien seeking entry to establish entitlement to categorization as a "nonimmigrant" (that is, a person seeking entry for a temporary stay).

All aliens seeking entry into the United States for permanent residence ("immigrants") are divided into two classes: quota immigrants and nonquota immigrants. Quota immigrants are aliens admitted within the limitations of the numerical quota granted by statue to their country of origin for each fiscal year. Nonquota immigrants are aliens emigrating from countries which are free of numerical limitations or aliens who individually are within categories of persons who, for public policy or

[2] For a more extensive treatment see Gordon & Rosenfield §§ 1.6–.17, 1.23–.29.

[3] The primary source of United States immigration law is the Immigration and Nationality Act, 66 Stat. 166 (1952), as amended, 8 U.S.C. §§ 1101–362 (1958) [hereinafter cited as I&N Act].

[4] An alien is defined as "any person not a citizen or national of the United States." I&N Act § 101(a)(3), 66 Stat. 166 (1952), 8 U.S.C. § 1101(a)(3) (1958).

other reasons, are not charged to the quota of their country of origin.

In the most useful and carefully written chapter[5] in this handbook, Mr. Wasserman deals with the admission requirements as they relate to both nonimmigrants and immigrants, quota and nonquota. He discusses the limitations upon eligibility for a visa to enter the United States as well as the several statutory grounds upon which an individual applicant may be disqualified. Here is laid bare in a concise and admirably footnoted fashion the complexities of the numerical quota system and the preferences operative within it as well as the nuances of the disqualification standards—mental, physical, economic, criminal, moral, educational and subversive—upon which a visa may be denied. Samples of the several forms required by the State Department of aliens applying for admission are included. They are indispensable guides for the tyro.

Later treatment is given to the procedures by which entitlement to nonquota status is secured (Chapter IX). Several special classes of nonquota immigrants receive attention in a chapter entitled, "Special Classes of Aliens" (Chapter XI). Mr. Wasserman's treatment of these individual categories is brief, but cogent.

After obtaining an entry visa and traveling to the borders of the United States, an alien must again satisfy the authorities of his admissibility. Mr. Wasserman succinctly states that "a visa is not a guarantee of admission to the United States." The facets of the reexamination inquiry are known as "the exclusion process" (Chapter V).

Aliens who have been admitted to the United States may, of course, be required to leave. The process by which their departure is obtained is deportation. Mr. Wasserman devotes three chapters to various aspects of deportation—one to the standards applicable and the grounds upon which it may be accomplished (Chapter VI); one to the administrative process itself (Chapter VII) and one to various available methods of obtaining temporary or permanent relief from deportation (Chapter VIII).

The judicial review of administrative determinations in immigration cases is dealt with in a truncated, but current, fashion by Mr. Wasserman (Chapter X). In an effort to bring order to an increasingly chaotic pattern of judicial review, Congress enacted

[5] This chapter has been reprinted as Wasserman, *Requirements for Admission of Aliens into the United States*, 7 Prac. Law. 17 (1961).

corrective legislation at its last session.[6] It created "a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens from the United States." [7] The review procedure preserves certain traditional habeas corpus remedies while adopting the procedure for the review of orders made by other Governmental agencies.

It would have been more desirable had Mr. Wasserman devoted more than 5 of the 21 pages allotted to judicial review to a discussion of the relevant legal problems. He might, for instance, have offered the reader more than a single paragraph concerning the right of persons, both within and without the United States, claiming United States nationality to bring a declaratory judgment action to test administrative deprivations of their rights and privileges as nationals. The statutory provision[8] raises a variety of important procedural and constitutional problems.[9] Unfortunately, the author chose instead to devote 16 pages to the pleadings he utilized in the *Mezei*[10] and *Rubenstein*[11] cases. The pleadings are of some interest as forms. But they undeniably take a disproportionate amount of the available space which is at such a premium in a handbook.

Six brief chapters of varying utility constitute the final 34 pages of the handbook. The alien registration and reporting requirements are dealt with summarily in Chapter XII.[12] The rehearsal contained in Chapter XIV of the monetary penalties, civil and criminal, to which aliens, United States citizens, and transportation lines may be subjected, is a helpful compilation. But the discussion of the taxation of aliens (Chapter XV) and of their rights and disabilities in the United States (Chapter XVI) is woefully incomplete. Both chapters should have been omitted, as should Mr. Wasserman's six-page venture into the law of nationality and the law of naturalization (Chapter XVII).

Particularly disappointing to the military lawyer is Mr. Wasserman's chapter on "Military Training and the Alien" (Chapter

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[6] 75 Stat. 651 (1961), 8U.S.C. § 1105a (Supp. III, 1961).

[7] U.S. Code Cong. & Ad. News, 87th Cong., 1st Sess. 4332 (1961).

[8] I&N Act § 360, 66 Stat. 273 (1952), 8 U.S.C. § 1503 (1958).

[9] See Gordon & Rosenfield § 8.30 (1959) for an interesting treatment of the problem. The apparent procedural necessity to be physically present in the United States to maintain such a suit, stated in § 8.30b at 890–2, has been eliminated by the Supreme Court. Rusk v. Cort, 7 L. Ed. 2d 809 (1962). The ultimate constitutional question in the case—whether a native born U.S. national may be denationalized for remaining abroad to avoid being drafted—was set down for reargument next term.

[10] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953).

[11] Rubinstein v. Brownell, 206 F.2d 449 (D.C. Cir. 1953).

[12] Paragraphs 13 and 14, Army Regs. No. 608–3 (Jan. 28, 1960), cover these matters more concisely.

XIII). Subject to certain exemptions, every male alien in the United States between 18 and 26 must register for military service. This requirement and its concomitant effects have given rise to a battery of legal problems. An alien, nonimmigrant student of draft age, for example, is sometimes confronted with the choice, after one year of residence in the United States, of either being drafted or claiming draft exemption. A successful draft exemption claimant is forever barred from United States citizenship.[13] But the self-same student who chooses to serve in the United States armed forces for two years may be little better off, from a practical standpoint, as he has no guarantee that he will be allowed to remain in the United States upon completion of his period of service. Never having been admitted to the United States for permanent residence, the student may find himself subject to deportation proceedings upon his release from service.

The special naturalization benefits available to aliens who have either served honorably in the armed forces for a period of three years[14] (*not* just the Army as Mr. Wasserman states at 159), or during World Wars I and II, or the Korean War,[15] receive passing mention. These provisions are, strictly speaking, part of the law of naturalization rather than that of immigration. If treated at all, they were deserving of more than a restatement of the statutory language. In an area where he might have rendered a very substantial service, Mr. Wasserman chose to tarry for barely two pages. Clearly outside his area of real interest in this handbook, this subject awaits an interested scholar.

Does Mr. Wasserman succeed in overcoming the "severe hardships" confronting the author of a handbook? In fairness, this writer must state that he achieves only middling success. The author is much like that well-known little girl who "when she was good, was very very good; but when she was bad, she was horrid." In his attempt to be overly comprehensive, the author included a number of incomplete (and really unnecessary) chapters

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[13] I&N Act § 315, 66 Stat. 242 (1952), 8 U.S.C. § 1426 (1958). A claimant must both apply for exemption and, in fact, be relieved from service in the armed forces before the bar to citizenship attaches. In the Matter of Rego, 289 F.2d 174 (3d Cir. 1961), *reversing*, 185 F.Supp. 16 (D.N.J. 1960). Military service performed, after a change of heart, following a successful exemption claim seemingly raises the bar to citizenship. Cannon v. United States, 288 F.2d 269 (2d Cir. 1961). *But see*, 288 F.2d 269, 272 (dissent).

[14] I&N Act § 328, 66 Stat. 249 (1952), 8 U.S.C. § 1439 (1958). The service required by the statute need not be service on active duty. Service in the USAR Ready Reserve is sufficient. United States v. Aronovici, 289 F.2d 559 (7th Cir. 1961) (2 years of active duty service, 2 years of USAR service).

[15] I&N Act § 329, 66 Stat. 250 (1952), as amended, 8 U.S.C. § 1440 (Supp. III, 1961).

on ancillary matters. In his endeavor to be up-to-date, the author incorporates the statutory changes which became law last September. Sadly, it appears, he did so very hurriedly. And the upshot is the sacrifice of the great clarity required of him.

But is this handbook worthy of purchase? It most emphatically is. Although the reader does not uniformly get his due, when he does, he gets it with dividends. For the practitioner whose research facilities are minimal—a category in which the military legal assistance officer too often finds himself, this handbook is indispensable. The chapter dealing with admission requirements and that on source materials for further research alone justify the addition of this volume to working legal libraries. Mr. Wasserman is to be applauded for his substantial effort to make a complex area of the law understandable. This writer can only hope that he will not wait too long before he revises and expands his unique handbook.

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